UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/1999/63/Add.2
11 January 1999

ENGLISH
Original: ENGLISH/FRENCH/
SPANISH

COMMISSION ON HUMAN RIGHTS
Fifty-fifth session
Item 11 (a) of the provisional agenda

CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF: TORTURE AND DETENTION

Report of the Working Group on Arbitrary Detention

Addendum

Report on the mission to Peru

GE.99-10190 (E)

CONTENTS

		Paragraphs	Page
Introduction		1 - 15	3
I.	HISTORICAL BACKGROUND TO THE TERRORIST MOVEMENT IN PERU AND ACTION TAKEN TO COMBAT IT	16 - 22	5
II.	THE JUDICIARY AND RELATED INSTITUTIONS	23 - 40	6
	A. Reform of the judiciary	25 - 32	6
	B. Reform of the Office of the Public Prosecutor	33 - 34	8
	C. Provisional status of judges and prosecutors	35 - 36	8
	D. Constitutional Court	37 - 38	8
	E. National Council of the Judiciary	39 - 40	9
III.	ANTI-TERRORIST LEGISLATION	41 - 107	9
	A. Penal measures to combat terrorism	41 - 55	9
	B. Procedural measures to combat terrorism	56 - 107	12
IV.	PRISON REGIME FOR PERSONS CONVICTED OF TERRORIST OFFENCES AND TREASON	108 - 118	21
V.	THE SITUATION OF FORCED CONSCRIPTS	119 - 121	23
VI.	CAUSES OF ARBITRARY DETENTIONS	122 - 150	23
	A. Violation of the right to freedom of expression (category II)	123 - 124	23
	B. Serious violations of the right to a fair trial (category III)	125 - 150	23
VII.	"INNOCENT PRISONERS", THE LAW OF PARDONS AND THE AD HOC COMMITTEE	151 - 166	28
VIII.	CONCLUSIONS AND RECOMMENDATIONS	167 - 180	30
	A. Conclusions	167 - 174	30
	B. Recommendations	175 - 180	32

Introduction

Mandate and objective of the mission

1. The Working Group on Arbitrary Detention visited Peru from 26 January to 6 February 1998, at the invitation of the Peruvian Government. The delegation was composed of the Vice-Chairman of the Working Group, Louis Joinet (head of delegation), and Roberto Garretón. The Working Group was interested in visiting Peru because it lacked information on the laws and practices used to combat terrorism, which has been plaguing Peru since 1980, and had therefore been unable to state its opinions on the subject.

2. The visit was scheduled for 1997 but was postponed because of the hostage crisis at the Japanese Ambassador's residence.

3. The cooperation of the Peruvian authorities was exemplary and characterized by complete transparency. The delegation spoke in private with detainees whose names appeared on lists made available at the prisons and with other prisoners chosen at random. The prison directors cooperated willingly as they had received written instructions to do so. The Working Group obtained all the information it requested.

4. The Working Group would like to thank the Peruvian authorities for their warm welcome and cooperation. It also thanks public officials, private individuals, organizations, lawyers, families, and all those who provided it with useful information in Lima, Juliaca, Puno and Chiclayo.

5. Special thanks go to Ms. Kim Bolduc, United Nations Resident Coordinator, and her staff, who efficiently coordinated the logistics of the programme. The Committee would also like to thank the head of the United Nations Information Office, Ms. Rosario Sheen.

Mission programme

6. In Lima, the Working Group met with the Minister of Justice and the Minister for Foreign Affairs. It also met with the Director of the National Prisons Institute and with the Secretary of the Executive Commission for Human Rights. The meeting with the Minister of the Interior was cancelled because of the natural disasters caused by El Niño.

7. The Working Group also held meetings with the President and members of the Government and the opposition; the Commission on Human Rights and Pacification of the National Congress; the Vice-President and members of the Parliamentary Justice Committee; the President and four members of the Supreme Court; the Attorney-General of the Nation; the Ombudsman and lawyers from his office; two members of the Ad Hoc Committee on Pardons; Fr. Hubert Lanssiers; the President of the Supreme Council of Military Justice; the Secretary of the Executive Committee of the Judiciary and his advisors; the President of the Bar Association, Dr. Delia Revoredo; the President of the Human Rights Commission of the Bar Association, Mr. Heriberto Benítez; the President of the Lima High Court, Dr. Marco Ibazeta Marino; and the Director-General of the

Academy of the Judiciary, Mr. Francisco Eguiguren Praelli. The Working Group also met with Judge Elba Minaya and the President of the National Association of Judges of Peru.

8. Also in Lima, the Working Group met with the following non-governmental organizations, collectively and separately: National Coordinator for Human Rights, Centre for Studies and Association for Peace (CEAPAZ), Legal Defence Institute (IDL), Ecumenical Federation for Development and Peace (FEDEPAZ), Pro Human Rights Association (APRODEH), Amazon Centre of Anthropology and Practical Application (CAAAP), Episcopal Commission for Social Action (CEAS) and Andean Commission of Jurists (ACJ). It also met with lawyers and relatives of detainees and released persons.

9. In Lima, the Working Group visited the prisons of Castro Castro, Lurigancho and Santa Monica in Chorillos, which houses female prisoners. During the discussions prior to the mission, the Peruvian authorities informed the Working Group that it could have free access to all detention centres in the country, except for the Callao naval base, which is under military jurisdiction.

10. The Working Group visited the cities of Puno, Juliaca and Chiclayo, where there are High Courts which have tried a large number of cases of terrorism, as well as prisons housing prisoners whose cases have been submitted to the Working Group.

11. In Puno, the Working Group met with the President of the Juliaca High Court and prosecutors, the main NGOs in the southern region and the defence lawyers of persons detained for terrorist acts. It visited Yanamayo prison, which is located at an altitude of 4,200 m.

12. In Chiclayo, the Working Group was received by the President of the Lambayegue High Court and by prosecutors and judges. It also met with lawyers and relatives of prisoners, the directors of CEAS, IDL and CEAPAZ and the Deaconry for the Office of the Archbishop of Piura and Tumbes and the Office of the Bishop of Chulucanas; it also visited Picsi prison.

Legislation relevant to the mission

13. The cases of imprisonment reported to the Working Group since 1991 all relate to criminal charges of terrorism or treason. The Group has received no communications about detentions for ordinary offences.

14. The Group studied anti-terrorist legislation enacted since 1992. Harsh to begin with, many of these laws have either been amended in a positive sense or repealed, an improvement that the Working Group commends highly, as did the Special Rapporteur on the independence of judges and lawyers, Param Cumaraswamy, in his report (E/CN.4/1998/39/Add.1) on his visit to Peru in September 1996. However, the earlier laws were applied in many of the cases brought to the attention of the Working Group and it therefore had to study them in depth so that it could express opinions on the detentions based on them.

15. After the visit, eight "legislative decrees" with procedural and penal provisions were enacted to combat ordinary crime and protect "national security", along the same lines as the anti-terrorist legislation. Observations are made on these provisions as they could give rise to arbitrary detention.

I. HISTORICAL BACKGROUND TO THE TERRORIST MOVEMENT IN PERU AND ACTIONS TAKEN TO COMBAT IT

16. Terrorism started in Peru on 17 May 1980 with attacks by a splinter group of the Peruvian Communist Party, founded by Carlos Mariátegui. The first action by the group was to destroy the voting materials for the presidential election then taking place in Chuschi. Invoking the "Shining Path which Mariátegui showed us ...", the splinter group then launched a ruthless war against the State. Soon, the movement became known as the Shining Path, although the name was not accepted by its members. Shining Path is divided into cells and it operates mainly through recruitment under threat of death; a large number of persons are forced to join its ranks without being able to put up any resistance.

17. It is the public perception that the Shining Path declared a "total revolution", employed violent means to achieve it, and in the process showed contempt for the right to life. Some contend that its genesis could be attributed to each successive Government's historical neglect of the peasant majority. The modus operandi of the Shining Path is the following: when it arrives in a village, it rounds up the population, demands assistance in the form of lodging and food, and kills groups of people to show how powerful it is. It is said that the victims are usually those who have been forced to provide food and lodging for members of the armed forces hunting the Shining Path. The civilian population is apparently caught between subversive and repressive violence. Among the victims are local authorities, mayors and persons with social standing; on occasion the Shining Path is said to have killed up to 80 unarmed civilians, including women and children.

18. Since the capture of its leader, Abismael Guzmán, in 1992, Shining Path has been split between those who, following Guzmán's example, call for peace and those who continue to commit barbarous acts to achieve the demands of marginalized populations, who themselves reject Shining Path's methods.

19. The Marxist Tupac Amaru Revolutionary Movement (MRTA) started its operations in 1984 and is definitely Shining Path's rival; there is no contact or solidarity between them and they are constantly disputing areas of influence. 1/ The rivalry between them is so great that they have to be separated from each other in prisons. Their cruelty and fighting methods are nevertheless similar.

20. These groups have caused about 30,000 deaths since 1980, including those killed by the armed forces, as well as the exile and displacement of many persons.

21. The State decided to defend society by using military and legal means. The military approach resulted in the deaths of countless non-combatants and in many respects in no way differed from the practices of the subversive

groups. Torture was reported so often between 1992 and 1994 that the Committee against Torture and the Special Rapporteur on the question of torture refer to torture as being frequently practised in Peru. 2/

22. The main legal instruments are states of exception and criminal and procedural legislation which often does not respect international human rights standards.

II. THE JUDICIARY AND RELATED INSTITUTIONS 3/

23. One of the first acts of President Fujimori after the coup he orchestrated on 5 April 1992 was to reorganize the judiciary and the Office of the Public Prosecutor, which had lost prestige in all sectors. Decree-Law No. 25.418 of 7 April, which is designed to ensure "the moral administration of justice", suspended the 1979 Constitution as being incompatible with it.

24. Thirteen members of the Supreme Court, all members of the Court of Constitutional Guarantees, the members of the National Council of the Judiciary, the Attorney-General of the Nation and 130 magistrates at different levels were dismissed on 9 April. Their replacements were appointed by the Government itself. The new Supreme Court was authorized to evaluate the civil servants under its jurisdiction and to fill vacant posts in other courts.

A. Reform of the judiciary

25. The aim of the reform process is to relieve judges of functions other than purely judicial ones, which were carried out by the plenary of the Supreme Court. The Executive Council was responsible for the management of the Court and the General Management Office had executive administrative functions (Act No. 25.869 of 1994).

26. In 1995, the Executive Commission of the Judiciary (CEPJ) was set up, assumed the functions of the Executive Council and became responsible for implementing the reform. The CEPJ, composed of the presidents of the various chambers of the Supreme Court, takes the initiative on legal matters, evaluates and dismisses judges, and establishes the promotion register for judges. The Executive Secretary of CEPJ is Navy Commander José Dellepiani, who has enormous influence over the whole process. The reform has strong government and international financial backing.

27. In addition to CEPJ, another dual structure body, the Judicial Coordinating Council, was created in 1996. It is responsible, inter alia, for coordinating general policy on the development and organization of judicial institutions and for defining strategies, "without prejudice to the independence and autonomy of each constituent organ". In future, the entire legal community (the judiciary, the Ministry of Justice, the National Council of the Judiciary, the Attorney-General of the Nation, bar associations, law faculties and, possibly, the police and others) will be a part of its permanent structure. Until the end of the reform (31 December 1998), however, it will be composed only of the judicial organs and of an Executive Secretary, who is entitled to speak and to vote. During this time, the Council will formulate judicial policy. In judicial circles, it is generally believed that, because it replaces the ordinary judicial organs provided for in the

Constitution, this Council is unconstitutional. Five of the seven members of the Constitutional Court were of this opinion, but the required constitutional majority to overturn legislation is six.

28. The reform has positive aspects in terms of administration, decentralization, judicial rosters (turnos), operations, and a significant increase in judges' salaries. It is a major achievement to have freed judges from administrative tasks, which are now carried out by "corporate" support services. Good results have been achieved in areas where the system has been operating on an experimental basis, i.e. Lima and Lambayegue, but the backlog has not yet been dealt with in Lima. Computerization appears to have been successful. New courts and services have been created, facilitating notification procedures, rogatory commissions, communications and archives. One hundred fifty provisional courts have been set up to deal with the backlog.

29. Other administrative measures include the distribution of cases to different competent courts, a common court office, the holding of hearings and judicial proceedings in the prisons for reasons of security and economy (which the lawyers interviewed appear to have accepted). The Working Group visited the courtrooms in Castro Castro prison and saw that the facilities were comfortable and that since 1997 equipment that had been used to protect the anonymity of judges had been removed. Separate courts try persons who are imprisoned and persons who are at liberty. "Itinerant" judges and courtrooms have been set up in places where trials are held, thus avoiding the need to transfer case files, accused persons and witnesses. "Permanent courts" operate 24 hours a day, thereby reducing the number of persons held in police custody. Previously, 80 per cent of the persons arrested by the police remained in detention, whereas now, only 20 per cent do. The Supreme Court is considering setting up provisional courts.

30. It was ordered that, in the event of conflicting precedents, the full court must establish which jurisprudence is compulsory.

31. A major effort is being made by the Academy of the Judiciary to train judges.

32. The main criticisms of the reform which have been brought to the Working Group's attention and which threaten its credibility are: neither the legal community nor the general public perceive, as is generally held to be the case, that the reforms are politically neutral; according to many critics, the reform does not deal with important issues such as the independence of the judiciary and, in particular, it does not tackle the thorny problem of the competence of military courts to try civilians or members of the army when the victims are civilians or society as a whole. Another criticism relates to political interference, such as the transfer or dismissal of judges who are critical of the Government. One example is Administrative Decision No. 399 of 14 October 1997, which provides that habeas corpus cases can be heard only by the only two judges specializing in public law, thereby ruling out the participation of judges who have proven their independence (formerly, any criminal judge could hear cases of this kind). Another criticism was directed at the arbitrary change in the composition of the divisions of the Lima High Court, normally done at the start of the judicial year. Moreover, judges and

lawyers feel that the Executive Commission of the Judiciary influences the appointment and transfer of judges, as well as the composition of divisions of collegiate courts, something the Executive Secretary categorically denied.

B. Reform of the Office of the Public Prosecutor

33. The Office of the Public Prosecutor is headed by the Attorney-General of the Nation, who is elected for three years by the six-member Board of Senior Prosecutors and may be re-elected for a further two. An act adopted in 1992 stipulated that the post should be given to the most senior prosecutor, account being taken of the time served in a provisional capacity; this postponed until 1997 the election of the present Attorney-General, who is recognized as being independent.

34. Act No. 26.623 established the Executive Commission of the Office of the Public Prosecutor (CEMP), which the Government made responsible for servicing and administering the reform process and for appointing provisional prosecutors. This Act and the amendment thereto (Act No. 26.738) placed a serious constraint on the powers of the new Attorney-General of the Nation by making the new body responsible for appointing senior and provisional provincial prosecutors and bringing a public right of action for ministerial offences against judges and, most importantly, by giving it management responsibility for the service as a whole. The establishment of CEMP may well compromise the transparency of appointments and the independence of the Office of the Public Prosecutor.

C. Provisional status of judges and prosecutors

35. Since the dismissal from their posts of prosecutors and judges in 1992, vacancies in the Supreme Court and among senior prosecutors have been filled by the executive branch and, in more junior posts, by the judiciary itself, by naming "provisional" officials. For the Working Group, this situation, which has existed for six years, is serious because, at present, only 27 per cent of judges and prosecutors (1,456 posts) have tenure. Of the remainder, 16 per cent are provisional (they hold a junior post, but have been provisionally promoted to a more senior post in the hierarchy) and 57 per cent are alternates (judges who are not part of the system of the administration of justice). For the Special Rapporteur on the independence of judges and lawyers, "the trial of persons ... by judges without security of tenure constitutes prima facie a violation of the right to be tried by an independent tribunal" (E/CN.4/1998/39/Add.1, para. 106).

36. The Working Group received many statements critical of Act No. 26.898 of 15 December 1997, which gives provisional judges the same rights, prerogatives and restrictions as tenured judges and would therefore affect the results of key elections in which the latter have a majority such as that for the Supreme Court judge who is to chair the National Electoral Board.

D. Constitutional Court

37. This Court is the body which monitors the Constitution (art. 201). It has jurisdiction in second instance over amparo, habeas corpus and habeas data proceedings which have been dismissed and in sole instance over

unconstitutionality actions. A limited number of persons are entitled to bring such actions (the President of the Republic, the Attorney-General of the Nation, the Ombudsman, 25 per cent of members of Congress, 5,000 citizens, the Presidents of Regions and vocational associations in their own areas of specialization). According to the Court's regulatory act, the unconstitutionality of laws must be approved by six of the Court's seven members (86 per cent).

38. The Court's credibility in the eyes of the public and particularly in the eyes of the legal community has been weakened by the dismissal of three of its judges, who considered an interpretative provision of the Constitution with obvious political content to be unconstitutional.

E. National Council of the Judiciary

39. The 1993 Constitution increases the powers of the National Council of the Judiciary, which it declares to be autonomous. The Council is responsible for selecting and appointing, with the approval of two thirds of its members, judges and prosecutors at all levels, except when they are elected by the people (justices of the peace). The Council is required to confirm judges and prosecutors every seven years. The Council is composed largely of members of the legal community (Supreme Court, Board of Senior Prosecutors, bar associations), but also of other social sectors, including the rectors of private and national universities, other vocational associations and, if the Council so decides, business and labour.

40. At present, it does not exercise its basic function: alternate or provisional officials are appointed only in the form described, without the participation of the National Council of the Judiciary, which can also not dismiss Supreme Court judges at present.

III. ANTI-TERRORIST LEGISLATION

A. Penal measures to combat terrorism

41. Since March 1981 (Legislative Decree No. 046), a large number of anti-terrorist laws have been promulgated (Act Nos. 24.651 and 24.700 of 1987, 24.953 of 1988 and 25.031 of 1989), while the new Penal Code (Legislative Decree No. 635) of 1991 contains new provisions on terrorism. The laws have all increased the powers of the police and reduced the supervisory role of judges. They were repealed in 1992, but then replaced by more stringent measures.

1. The new definition of the offence of terrorism

42. Decree-Law No. 25.475 of 6 May 1992 was the first law promulgated by President Fujimori to fight terrorism after he dissolved Parliament. Article 2 provides for prison sentences of 20 years to life for various acts described generically as "terrorism". Under the law, a terrorist is a person who provokes or maintains a state of terror among the population or part of the population, commits acts against life, physical integrity, health, freedom and security of person or against property, against the security of public buildings, roads or means of communication or any other goods or services, by

the use of arms, explosive materials or devices or any other means which may cause criminal damage or serious disturbance of the peace or affect the international relations or security of the State.

43. The penalty depends on where the perpetrator stands in the organization: anyone who orders or commits murder is given a life sentence; other activists who cause damage, loss or injury, 30 years; anyone who "in any form" assists in the commission of terrorist acts, a minimum of 20 years' imprisonment.

44. The vagueness of the definition, particularly of the first part, has given rise to cases of arbitrary detention. The term "acts" (which may not be offences) against life, physical integrity, health, etc. is just as vague, and even more so is the fact that the material objects affected may be "other goods or services". A person who carries out an attack on property and causes fear in a sector of the population, even if that was not his intention, is as criminally liable as someone who attacks a group of persons with intent to kill.

45. It is, moreover, not good legislative practice to establish only minimum, but not maximum, penalties, thus leaving room for violations of one of the aspects of the principle of legality.

46. Acts of collaboration without criminal intent, a form of criminal participation that is normally not punishable, and the concealment of another crime may be punished. The Working Group received a large number of complaints about this because, in many cases, people collaborated with subversive elements only under duress.

2. The offence of "treason"

47. Decree-Law No. 25.659 of August 1992 penalizes aggravated forms of terrorism (which it terms "treason") committed in the following ways:

> "(a) utilization of car or similar bombs, explosive devices, weapons of war or similar weapons that cause death of persons, impair their physical or mental health, damage public or private property or in any other way give rise to serious danger for the population;
> (b) storage or illegal possession of explosives, ammonium nitrate or the chemicals used in its manufacture or the voluntary supplying of components or materials that can be used in the manufacture of explosives for use in the terrorist acts listed in the preceding paragraph".

48. The Decree-Law amends the definition of "participation" given in Decree-Law No. 25.475, considering as perpetrators of treason: the ringleaders of terrorist organizations; those given the task of physically eliminating other persons; anyone who provides reports, data or documentation which facilitates the entry of terrorists into buildings or premises so that damage may be caused. Life imprisonment is the only penalty.

49. Such offences have nothing to do with what is usually defined as treason. The Constitution in force when the Decree-Law in question was enacted defined "acts which are accepted as such" as treason (art. 245).

Apparently, the intention was to allow the application of the death penalty for terrorist offences, as Peru has been a party to the American Convention on Human Rights since 28 July 1978, i.e. since before the adoption of the 1979 Constitution, and the Convention allows the death penalty for treason. 4/ In the opinion of the Working Group, this is an obvious misuse of terms for purposes contrary to those of criminal law.

50. A number of foreigners have been convicted of treason, apparently on the basis of article 78 of the Code of Military Justice, which provides that this offence can be committed by "any Peruvian by birth or naturalization or any person in any way under the jurisdiction of the laws of Peru". General Guido Guevara, President of the Supreme Council of Military Justice (CSJM), said that "it is a fallacy that treason cannot be committed by foreigners. If it was committed in Peru, then the Peruvian courts have jurisdiction to try the case. The easiest cases to try are those of treason committed by foreigners".

51. The extreme vagueness of the Act has caused serious conflicts of jurisdiction, which have led to unacceptable trial delays, as a well-known report, which had a great impact in the country, warned in 1993, stating that "Since the offences of terrorism and treason can easily be confused, it is very possible that a case may be assigned to the wrong court and that inappropriate sentences may be imposed". 5/ The Working Group has been notified of cases in which the accused was twice declared innocent, each time by both courts, before finally being released, whereas in other cases, the individual was acquitted for an act defined in one way by the police only to be convicted later for another offence arising from the same set of facts. In the case of María Elena Loayza Tamayo, the Inter-American Court of Human Rights stated that this procedure is contrary to the principle non bis in idem. 6/

52. In previous reports (E/CN.4/1993/24, para. 32, E/CN.4/1994/27, para. 63, and E/CN.4/1995/31, para. 51), the Working Group, although not specifically referring to Peru, warned that one of the main causes of arbitrary detentions was the vague definition of "treason".

53. The Decree-Law penalizes other behaviour such as particular types of association with criminal intent and the offence of endangering others, which do not necessarily have to give rise to any specific harm. Being a member of an armed group with responsibility for killing people is thus deemed to be treason, even if no one is killed.

3. Subsequent laws

54. More than 15 other laws have been promulgated, justified, it is claimed, by the fight against terrorism, and which have led to arbitrary detentions. Some of the most heavily criticized are: the "Repentance" Act, No. 25.499, later repealed; the Act on the Criminal Responsibility of Minors Aged between 15 and 18 Years, also repealed; and Decree-Law No. 25.708, on summary proceedings in the theatre of operations in cases of treason. A particularly well-known law was Act No. 25.880, which made it treasonable for teachers to "influence" their students by "defending" terrorism, thus not only making the definition of criminal offences even vaguer, but also directly affecting

academic freedom, which is simply one manifestation of freedom of opinion and expression. In this case, moreover, the trial is held in the military courts and the maximum penalty is life imprisonment. Under Act No. 26.508 of 20 July 1995 any beneficiary of the Repentance Act who commits a terrorist offence is guilty of treason.

4. Extension of the concept of terrorism to ordinary offences

55. Legislative Decree No. 895 of 1998, enacted to "combat organized crime by armed groups", punishes as a perpetrator of "aggravated terrorism" (even if it is an ordinary offence) any member or accomplice of a criminal group who carries firearms or explosives to commit any offence against life, physical integrity, health, property, individual freedom or public security, even if the perpetrator acts alone. The maximum penalty is life imprisonment. The Working Group believes that this is yet another violation of the principle of legality.

B. Procedural measures to combat terrorism

1. Extension of the jurisdiction of the military courts

56. The 1979 Constitution provided that military courts could try civilians only in the case of evasion of compulsory military service and treason during a war with another country. This important limitation was brought to an end with laws subsequent to 5 April 1992. Article 4 of Act No. 25.659 states that certain offences, such as treason, which are committed by civilians and in which no exclusively military interest is at stake may be transferred to military courts.

57. Article 173 of the 1993 Constitution goes even further, since it allows military courts to try the offences of "terrorism determined by the law", a law which has not yet been enacted, so that they continue to be within the jurisdiction of the civil courts.

58. Decree-Law No. 25.659 of 1992 also established a procedure, but Decree-Law No. 25.708 provided that summary proceedings would apply to trials "in the theatre of operations".

59. There are six areas of military justice. At the first level are the judges (around 30) who conduct the investigations and hand down sentences, of whom 50 per cent are military lawyers, according to the President of the Supreme Council of Military Justice (CSJM), General Guevara. At the second level are the courts-martial, made up of three military judges, one of whom is a lawyer. The highest level is the Supreme Council of Military Justice, which is composed of eight judges, an auditor and a public prosecutor, which functions in Chambers with five members, three of them lawyers.

60. Conflicts of jurisdiction between civil and military courts are settled by the Supreme Court (art. 141 of the Constitution). This is the only area where the civil courts have pre-eminence over military courts since the other case provided for is an appeal on cassation in the event of the death penalty for treason in wartime, which is not applicable.

61. The President of the CSJM reported that since August 1992, the military courts have tried 1,628 civilians, with the following results:

Sentenced	to life imprisonment	370 persons
	to 30 years' imprisonment	123 persons
	to 25 years	81 persons
	to 20 years	95 persons
	to 15 years	38 persons
	Total sentenced	707 persons
Acquitted		39 persons
Referred to the civil courts		315 persons
Still on trial in the military courts		567 persons

62. Although neither the Universal Declaration of Human Rights nor the International Covenant on Civil and Political Rights prohibits military justice from trying cases in which the accused or the victims are civilians, the practice in many countries, as the Working Group has verified, has shown that this often tends to be a source of injustice, particularly with regard to impunity for human rights violations, 7/ and the cause of arbitrary detentions, which are of particular concern to the Working Group.

63. The Group asked the President of the CSJM whether or not military personnel who act as judges are still subject to the chain of command. He said that military personnel in the system of military justice are outside the military chain of command. However, all the lawyers questioned indicated that the opposite is true.

64. Legislative Decree No. 895 of 1998 gave military courts jurisdiction over ordinary offences committed by armed groups.

2. Measures to protect judges

65. Act No. 25.475 on "faceless judges", applicable to ordinary courts, was improperly applied to military courts. It provided that the identity of judges, members of the Office of the Public Prosecutor and auxiliary staff should be kept secret at all stages of a trial. Decisions would not be signed, but the judges' identification codes would be recorded. Voice-distorting microphones and image distorters were installed. The Act was due to expire on 14 October 1995, but was extended, expiring on 14 October 1997. Although the Act has, wisely, been repealed, the Group is obliged to analyse it, as many of the prisoners whose cases are under consideration were tried under it. Since the withdrawal of anonymity, the Permanent Criminal Chamber of the Supreme Court is now the last resort for persons accused of terrorist offences.

66. The Government explained that the anonymity of judges was for their protection, as several of them were said to have been assassinated between 1983 and 1994. The Special Rapporteur on the independence of judges and lawyers reported that, "from 1992 to 1997, judges were not targets of the terrorist-related violence" (ibid., para. 74). The Government also repeatedly reported that the legislation was provisional and that it was repealed as a result of the success of the pacification process.

67. The Working Group received complaints that the system was a source of injustices: one person sentenced to 20 years' imprisonment said that the voice distorters "only made noise. I never heard the questions; I asked them to repeat them for me, but I don't know whether they did so" (Margarita Chiquiure, Santa Monica Prison, quoted by permission).

68. The Working Group understands that the State must protect its judges so that they can act without fear of reprisals. Only in this way can the right of the person on trial to be tried by an independent and impartial judge be respected. However, the Group also believes that such an exceptional and disproportionate measure - to use the words of Supreme Court judge Carlos Ernesto Giusti, killed during the rescue of hostages from the Japanese Ambassador's residence - should be accompanied by adequate safeguards and controls in order to ensure a fair trial and to establish the responsibility of the judges. Otherwise, the requirements of article 14 of the International Covenant on Civil and Political Rights would not be met, as stated by the Human Rights Committee in its preliminary observations (CCPR/C/79/Add.67), its concluding observations (CCPR/C/79/Add.72), and in its views on the communication concerning Victor Polay Campos (No. 577/1994).

3. Changes in criminal procedure

(a) Civilian courts

(i) The police investigation

69. As Ronald Gamarra maintains, trials for terrorism are based on the principles of exceptionality, summariness and secrecy. 8/ Proceedings are summary (investigations lasting not more than 50 days, trial lasting up to 15 days, proceedings before the Supreme Court lasting up to 15 days), with both automatic imprisonment and a prohibition on release during the investigation; trial in camera; limitation on the equal treatment of evidence; excessive weighting of the police investigation; restriction of the rights of the defence; until 1997, anonymity of judges; and lack of responsibility for legal actions and sentences.

70. In principle, the preliminary investigation should be the responsibility of the Office of the Public Prosecutor, in conformity with article 159 of the 1993 Constitution; the police should only carry out its orders. Nevertheless, Decree-Law 25.475 provides that, in the investigation of terrorist offences, it is the responsibility of the National Police of Peru "to conduct the police investigation" and, if it is not able to do so, then the Armed Forces should. The law orders the National Anti-Terrorism Department (DINCOTE) to guarantee

the rule of law and respect for human rights and international treaties and, to this end, to request that a representative of the Office of the Public Prosecutor be present.

71. The time limit for bringing the detained person before a judge is 15 days, but in cases involving the offence of treason, it may be doubled, despite a provision to the contrary in the 1993 Constitution. The competent judge, the public prosecutor and the military court (in cases of treason) only have to be "notified" within 24 hours of the arrest, which is not what article 9, paragraph 3, of the Covenant or principle 11 of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment require. Moreover, the National Police has the power to order the prisoner held incommunicado.

72. In areas where there are no representatives of the police, the Armed Forces may arrest suspects but have no power of investigation. But according to testimony that has been heard, the Armed Forces have often taken the place of the National Police and hold detainees for long periods. The allegations of torture relate to this period, as indicated by the Special Rapporteur on torture, Mr. Nigel Rodley, in his most recent reports (E/CN.4/1996/35, paras. 124-136, and E/CN.4/1997/7, para. 157), in which he cautiously welcomes measures designed to put an end to impunity. The same concern was expressed by the Human Rights Committee (A/51/40, para. 354). The cases of Luis Armando Quevedo (No. 86-93, Lambayeque High Court), Primogénito Losada and others (No. 110-93, Lambayeque), Gumercindo Tolentino (No. 755-94, Junín High Court) and others show that torture has been widespread, but has become less so recently.

73. Initially, during police interrogation the detained person did not have a lawyer, who "shall be able to intervene only from the time when the detained person makes a statement in the presence of the representative of the Office of the Public Prosecutor", which could be up to 15 days after the arrest. This was a breach of the rules and of principle 17 of the Body of Principles. Act No. 26.447 provides that persons accused of the offence of terrorism have the right to appoint a defence counsel of their choosing from the start of the police investigation, and that counsel can be present during the statement to the police; this is clearly a big step forward.

74. The "statement" or extrajudicial declaration is made at this stage. The lawyer and the representative of the Office of the Public Prosecutor should be present. In practice, according to complaints by NGOs and lawyers, the participation of the Office of the Public Prosecutor is particularly deficient. In the provinces, it is rare. An investigation by a reputable human rights defence organization states that 87 per cent of prisoners said that they saw no public prosecutor during the police investigation.

75. The investigation ends with the sworn statement (if a person has been detained) or the report (if no one has been detained), by means of which the court and the Office of the Public Prosecutor are informed of the steps taken. The sworn statement or report does not require the Office of the Public Prosecutor to bring a charge or the judges to hand down a sentence. The police often assign cases to the wrong court, one which does not have jurisdiction (see para. 51).

(ii) Incommunicado detention

76. A person can be held incommunicado in police custody with the knowledge of, but without an order from or the authorization of, the Office of the Public Prosecutor and a judge. The law limits this power to cases where "the circumstances and the complexity of investigations make it necessary", but all the interviewees stated that they had been subjected to incommunicado detention in police premises. None of them stated that they had received a visit from a lawyer while being held incommunicado. Fortunately, Act No. 26.447 of 20 April 1995 recognized that a person being held incommunicado has the right to speak with a lawyer.

77. It was said that prosecutors usually do not analyse the evidence collected by DINCOTE or the Armed Forces and limit themselves to reproducing the sworn statement, which will later become the basis of the accusation and subsequently of the sentence.

(iii) Examination proceedings

78. The examination is the investigation carried out by the judge. On receipt of the charge from the prosecutor, the judge initiates investigations which must be completed within 30 days, extendable for another 20 days if there are many persons accused or if it has not been possible to gather substantial evidence. Recently, it has been understood, with good reason, that the prosecutor is free to decide whether or not to bring charges.

79. Originally, article 13 (a) of Act No. 25.475 provided, in cases of the offences of terrorism and treason, that "without any exceptions, no type of release is appropriate". This severity was partially tempered by Act No. 26.248, which allowed unconditional release once the innocence of the person was established. Even in this case, however, release does not take place until it is approved by the High Court.

80. The most serious situation is that which the person deprived of liberty faces at the beginning of the examination. The judge may order an investigation if he considers it proven that an offence was committed, even if he is convinced that the person arrested by the police is not responsible for the offence. The law rules out the possibility of releasing the person, since it provides that "the judge shall issue the order for the start of the investigation by issuing an arrest warrant". It is, therefore, the police that, de facto decides the defendant's fate. This has been one of the phenomenon of "innocent prisoners" who have not been brought to trial (see chap. VII).

81. Once the examination has ended, the Office of the Public Prosecutor issues a legal opinion with its recommendations, after which the judge draws up a report stating whether the accused is innocent or guilty. There have been cases in which the prosecutor considers that the accused is innocent, but nevertheless brings charges (for example, in the case against José Luis Gutiérrez Vivanco, in the Lima High Court).

82. Once the case has been referred to the High Court, the High Court prosecutor may request oral proceedings. If he considers it inappropriate and the Court agrees, the release of the prisoners is ordered. Otherwise, oral proceedings are begun.

(iv) Oral proceedings

83. In principle, oral proceedings are public. This is a right protected by article 14 of the International Covenant on Civil and Political Rights. Terrorism cases were tried in camera, it being understood that they could not last more than 15 consecutive days. Since the suppression of "faceless" judges, the trials are public, but access to the courtroom is difficult.

84. Since the appearance in court of the officials who prepared the sworn statement is ruled out and the appearance of witnesses is restricted, the proceedings are limited to questioning the accused again; until October 1997, voice distorters were used and often did not reflect what the person said.

85. A common complaint is the lack of time to prepare the defence. "I was told on Tuesday at 8 p.m. that the trial was the following day; I did not even manage to read through the case file", said a lawyer. Another said, "They informed me on the morning of the previous day that the trial would be the following day. I had to share the case notes with four other lawyers. I managed to study a little, but I did not have time to see my client to ask him about what I had read. The trial took place the following morning and, by 12 noon, my client was sentenced to life imprisonment." There were many testimonies like these. This situation is another cause of "innocent prisoners".

(v) Sentencing

86. The trial ends either with acquittal or conviction.

87. There are also complaints in regard to sentencing. Some sentences do not take account of the accused's defence, but simply repeat the facts contained in the sworn statement, reiterated also by the prosecutor. The examination of a large number of sentences appears to confirm this finding. In the case of Mr. Gutiérrez Vivanco, mentioned above, the sentence takes it for granted that he contributed to the statements made to the police by the people who were arrested with him but whom he had never seen before (sentence of 17 June 1994, upheld by the Supreme Court on 28 February 1995). The defence counsel for Violeta Robles, case No. 40-95, added that the defence was a formality because the sentence had already been prepared and was read out as soon as the pleas had been made.

88. This would appear to be confirmed by the very large number of convictions. According to the prosecutor of Chiclayo High Court, statistics show that, in 1997, the Court convicted 635 persons and acquitted 589. 9/

89. A member of the Supreme Court told the Working Group that, in Peru, it is not customary explicitly to compare the statements of the prosecution and of the defence, but that judges do consider what is said by both parties.

(vi) Legal remedies

90. The remedy against a judgement by the High Court ("faceless" or open), although referred to as annulment is designed to bring about a modification of the judgement regarded as unjust. This remedy can be lodged either by the prosecutor or by the convicted person.

91. The first-instance judgement is reported to the Supreme Court prosecutor, but no special action by the defence lawyer is provided for, although written submissions are permitted. A panel of judges appointed by the President of the Supreme Court hands down the judgement, stating whether or not the sentence appealed is annulled.

92. Between 1993 and 1997 the Supreme Court heard 5,339 cases for offences of terrorism and overturned 844 judgements (15.81 per cent).

(b) Military courts

93. In cases relating to the offence of treason which are tried by military courts, the procedure is similar to that for the offence of terrorism, with some significant differences:

(a) The time limits are reduced by up to two thirds: the investigation thus lasts for up to 10 days, extendable by 6 days. The oral proceedings cannot last for more than five days, and the remedy of annulment must also be decided within five days. Moreover, since September 1982, summary proceedings are applicable to these offences for trials in the theatre of operations, which require the judge to rule within 10 days;

(b) Originally, legal remedies such as habeas corpus were not admissible at any stage of the proceedings, but it has since been restored with certain conditions;

(c) However, the time limit for the police investigation is not reduced; extrajudicial detention, by the National Police of Peru in the case of the offence of treason and authorized for a period of 15 days, can be extended for the same amount of time, at the request of DINCOTE;

(d) Incommunicado detention can be extended for the entire period of extrajudicial detention;

(e) Neither persons who contributed to the sworn statement nor the members of the Armed Forces who carried out the arrests can be called as witnesses;

(f) No benefit of any kind established in the Penal Code or in the Code on the Enforcement of Criminal Sentences is applicable to persons who are awaiting trial or have been convicted;

(g) The examination and the sentence in first instance are the responsibility of a military judge; the trial takes place in a court martial, with the only counsel being a military lawyer;

(h) The Supreme Council of Military Justice (CSJM) reviews sentences handed down by the court-martial as a result of the aforementioned "remedy of annulment" only when the penalty imposed is 30 years' deprivation of liberty or more; no appeal to a civil court is possible. A bill to remedy this situation, submitted in 1995, was shelved without discussion;

(i) Lawyers question the short period allowed for preparing the defence. The United States citizen, Lori Berenson, said "during my statement, I had no lawyer and, during the trial, the only thing they asked me was whether I intended to appeal, as the sentence was ready" (quoted by permission).

4. Restrictions on the use of particular forms of evidence, primarily witness evidence

94. The current text of article 13 of Act No. 25.475 prohibits persons involved in the drafting of the police report and "repenters" from appearing as witnesses; this is a violation of the right of defence, as provided for in article 14, paragraph 3 (e), of the Covenant. Moreover, this provision becomes a guarantee of impunity for any official who engaged in torture and other prohibited forms of treatment during interrogations.

95. All evidence is not given equal weight. The Working Group questioned a person sentenced to 20 years' imprisonment for the offence of terrorism, in whose case the only evidence was documents found in his home and whose authorship he denied, adding a verifiable fact: another person had lived in the house before and, when he moved in, the documents were already there. The police graphological evidence supports the theory that the documents were by the accused, but a private expert study shows the opposite. The Working Group has no details to enable it to believe either the accused or the police, but finds that it is contrary to the norm, embodied in the Covenant, that the court hear expert testimony requested by the defence. In the Gutiérrez Vivanco case, referred to above, a young man with a disabling heart condition was accused and convicted of armed assault on the basis of a police sworn statement, despite the fact that neither the witnesses nor the victims recognized him.

5. Repentance Act

96. To combat terrorism, the Government has encouraged members of subversive organizations to dissociate themselves from those groups. The aim was "to pacify the country, eliminate the problem of subversion and give those on the wrong track of terrorism an opportunity by providing them with guarantees of safety and privacy within the unconditional framework of human rights".

97. The first Act aimed at pacifying the country was Act No. 25.499 of 16 May 1992, which established three benefits for deserters: (a) a reduction in sentence for a person who abandons terrorism and confesses to the acts in which he participated; (b) exemption from punishment for the person providing information leading to the group being put out of action; (c) a suspension of sentence for a convicted person providing information leading to the routing of a terrorist group. This Act does not apply to those

responsible for the most serious crimes or to those who took part in offences which caused loss of human life. It requires that the statement made by the repenter must be proven.

98. The beneficiary is guaranteed that his identity will remain secret, as well as a change of identity, maximum measures to ensure his safety and physical integrity, welfare benefits and the extension of these benefits to his family.

99. The Act extended these benefits to peasants captured by terrorist groups and forced by threats to participate in terrorist activities. In 1993 these benefits were further extended to those involved in treason. The Act was abrogated on 1 November 1994 by Act No. 26.345.

100. According to the Act's Evaluation Commission, 8,390 persons benefited from the Act and most of them are now apparently at liberty. Nevertheless, in August 1997, 378 of them were still prisoners.

101. The Working Group notes that legislation concerning repentance of members of subversive groups is not directly contrary to international human rights instruments, but, as the Group saw in Peru, the risks of abuse the implementation of such legislation entails are considerable, since it gave rise to the phenomenon of "innocent prisoners".

102. Genuine repenters interviewed in Picsi claimed that promises of freedom had not been kept. Others said that they felt "cheated because the guarantees offered are not respected, as in the case of Crisanto Tiquillahuanca, who was murdered by militants of Shining Path". Although the repenters who are still in prison are isolated from the militants, they run the risk of being identified by their former comrades.

103. Peasants convicted of crimes which they were forced to commit protested that they had not received what they had been offered. According to the Ombudsman, this is because their situation was regarded as being cases of repentance and, as such, subject to the established administrative or legal procedures, and not, as the peasants thought, as cases not involving criminal responsibility or, consequently, punitive prosecution (Ombudsman's decision No. 040/97/DP).

104. However, the main complaints come from the victims of the repenters' testimonies. NGOs in Chiclayo said that in Chulucanas, one repenter was responsible for denouncing more than 200 persons, all were arrested, and they in turn denounced others. It was said that, in one case alone, No. 117/93, charges were brought against more than 80 persons as a result of denunciations by repenters. There was so much lying that 60 of them were freed; other examples were also cited. One well-known lawyer stated that "many members of the Shining Path gave out names in a completely irresponsible way, naming union members, journalists, local leaders, and all of them were imprisoned", since, "to justify its existence, DINCOTE forced detainees to repent for practically anything". One lawyer said that even the titles of the "leaders" - who attract the harshest penalties - were false: "On recruitment, they name the military chief, the civilian chief, etc., and, in the end, those people

are convicted for their titles'"; "the most serious thing is that judges do not require proof of what the repenter has said". This last criticism was heard over and over.

105. Other abuses also occurred: (a) many testimonies given during the time the Act was in force continue to be invoked informally; (b) DINCOTE continues to interrogate repenters; (c) the arrest warrants continue to be valid (see para. 166).

106. Another serious criticism is that repenters are not allowed to be cross-examined during trial.

107. Legislative Decree No. 901 of 1998, which uses the term "cooperation" rather than the term "repentance", has re-established certain benefits to "combat crime, thereby facilitating the cooperation of the persons involved".

IV. PRISON REGIME FOR PERSONS CONVICTED OF TERRORIST OFFENCES AND TREASON

108. Although material prison conditions are not directly within the Working Group's mandate, the Group will inevitably take note of them when visiting a country, as it did in Peru. In Peru, there are 89 prisons with a population of 24,408 inmates, of whom 13 per cent are on trial for or have been convicted of the offences of terrorism or treason; 91.8 per cent are men and 8.2 per cent women.

109. The prisons are administered by the National Prisons Institute of the Ministry of Justice, which is also being reorganized. Prisons for terrorist prisoners are within the jurisdiction of the Ministry of the Interior.

110. The Ombudsman said that security is more important than treatment in prisons, "despite the fact that, in accordance with article 139, paragraph 22, of the Constitution of Peru, the basic objective of penitentiary regimes is re-education, rehabilitation and reintegration into society".

111. Persons accused of terrorism and treason are separated from those accused or convicted of ordinary offences. The former are separated politically: members of Shining Path, members of the Tupac Amaru Revolutionary Movement and the "independents", who include those who do not belong to these movements and those who no longer belong to these movements, particularly the repenters.

112. In the maximum security prisons, the regime applicable to prisoners held for terrorist-related offences and treason, the living conditions and the system of visits are very harsh, although improvements are being made. Prisoners are confined to their cells and are allowed no visits during the first year. Later, they are subjected to forced labour and are allowed only one visit a month for one hour by their three closest family members. This regime is now weekly, but for those who are imprisoned in towns other than where their family lives, such improvements are largely academic.

113. In Picsi Prison, there were 1,053 inmates, of whom 327 were being held for terrorism. They included 104 "repenters" (99 sentenced and 5 on trial).

Of the remainder, 159 were convicted and 64 accused. Politically, 251 were from Shining Path and 76 were from Tupac Amaru. They were housed in two-person cells and in "blocks" of 20 to 30 inmates.

114. The new section of the same prison housed 142 prisoners, of whom 2 were convicted of ordinary offences and they were the cooks - which was the only way to avoid suspicions or favouritism in the matter of food among the two groups of offenders. Of the remaining 140, 130 were convicted and 10 were awaiting trial; politically, 113 were from Shining Path and 29 from Tupac Amaru. As of this year, the prisoners have had up to one hour of "sunshine" and one weekly visit.

115. In Santa Monica Women's Prison for persons convicted of treason and terrorism, there were 285 inmates who, until October 1997, had had only half an hour daily in the prison yard and, since that date, have been subject to the following regime: (a) special maximum security: 116 prisoners, separated politically, with one hour in the yard per day and one hour-long visit per week speaking through a grille in the visiting room; they can only work in their cells; (b) "improved category": 19 prisoners with the same regime of visits and yard exercise, but without separation for political reasons; (c) medium security: 84 prisoners, with two hours daily in the prison yard and two hours of visits without the visiting room grille; they can work outside their cells; (d) the 66 remaining inmates (minimum security) have an open regime of work, 4 hours a day in the yard and 4 hours of visits, and both adults and children can visit. The "repenters" are separated from the first group.

116. Yanamayo prison, a maximum security prison, is near Puno and houses 369 inmates, 33 of them women. The range of sentences is striking: 50 per cent (184, of whom 19 are women) are sentenced to life imprisonment, 150 others to a variety of very long sentences, and only 35 are awaiting trial. They are separated by party: 288 from Shining Path, 53 from Tupac Amaru, and 9 independents, plus 19 "felicianistas" (Shining Path dissidents who continue the armed struggle).

117. Castro Castro, a high-security prison, housed 395 common-law convicts considered dangerous (drug traffickers), separated from 995 "terrorists" subject to a different regime. Accused and convicted persons are not separated, which is contrary to the United Nations Standard Minimum Rules for the Treatment of Prisoners.

118. Lurigancho was built for 1,800 prisoners, but today houses over 6,000, all for ordinary offences. The main complaint of the persons interviewed was the scarcity of work materials and the slowness of trials, which meant that 96.4 per cent of the prisoners were awaiting trial and only 3.6 per cent were convicted (among those imprisoned for terrorism, 68.8 per cent were awaiting trial and 31.2 per cent were convicted). They were informed of their rights and had a system for complaining to the authorities. They are entitled to one weekly visit.

V. THE SITUATION OF FORCED CONSCRIPTS

119. Commission resolution 1997/50 enables the Working Group to examine cases of deprivation of liberty other than "arrest" or "detention". Such is the case of the "levies" that have frequently been reported to the Group. The term applies to forced recruitment by the Armed Forces of young men allegedly old enough to perform compulsory military service. Complaints have been made that minors under 18 years of age and even children under 15 years of age have been conscripted in this manner. Levies are made easier because subversive groups have destroyed public records, which makes it difficult to prove one's age, although cases have also been reported in which the military were the ones who destroyed the records.

120. Regrettably, in those cases in which an application for habeas corpus was filed, it was not successful (Constitutional Guarantees Court, habeas corpus on behalf of Jorge Briones. El Peruano, 22 August 1987). The judges allow only public documents as proof of age, rejecting other means such as expert witness statements.

121. The Working Group hopes that the new legislation adopted by the Peruvian Government on 9 November 1998 (Law No. 26.989 amending article 7 of the Law on Compulsory Military Service and prohibiting forced recruitment) will put an end to the practice of "levies".

VI. CAUSES OF ARBITRARY DETENTION

122. The Working Group regards as arbitrary deprivations of liberty those which come within one of the categories mentioned in its terms of reference. It is recalled here that Peru is a party to the International Covenant on Civil and Political Rights. The Group did not note any cases of deprivation of liberty without any legal basis (category I of its methods of work).

A. Violation of the right to freedom of expression (category II)

123. Although in principle action to combat incitement to violence is legitimate, the Working Group has dealt with prison sentences which are based on the offence of "advocating terrorism" and may be categorized as arbitrary: one person was sentenced for painting a hammer and sickle (this is not advocating terrorism or eulogizing a terrorist) on the basis of the precedent of "proceedings" for a terrorist offence (Supreme Court judgement, 20 April 1994, case No. 623-93). Another was sentenced for possession of subversive literature and the assumption that he had used it in indoctrination (Supreme Court, 30 January 1995).

124. Arbitrary arrests are carried out under Act No. 25.880 (see para. 54).

B. Serious violations of the right to a fair trial (category III)

1. The right to habeas corpus

125. Habeas corpus, a right protected by article 9, paragraph 4, of the International Covenant on Civil and Political Rights, is recognized in article 200 of the 1993 Constitution. In this provision, which is highly

valued in legal writings and by human rights defenders, it is also stated that this right cannot be suspended during states of emergency. The law allows it to be invoked even when imprisonment is ordered by a judge.

126. Habeas corpus was suspended until 25 November 1993 for persons arrested for the offences of terrorism or treason. It was restored by Act No. 26.248 with restrictions: only a judge specializing in terrorism, where such exists, can try such cases; the petitioner must be identified; the petitioner may not challenge the jurisdiction of the court; and other, similar, restrictions.

127. The Working Group regrets that there are judges who continued to apply the prohibition after it was repealed: the action on behalf of the lawyers Ernesto Messa, Carlos Gamero, Luis Ramón, Teófilo Bendezú and Freddy Huaraz was thrown out on the basis of the repealed Act (15 December 1997, case No. 287-97-HC, Judge Percy Escobar, upheld by the Provisional Corporative Chamber Specializing in Public Law).

128. Other limitations on the effectiveness of habeas corpus result from the refusal of military courts to give due regard to decisions of the civil courts. The Working Group was of the opinion that the detention of Gustavo Adolfo Cesti, ordered by the military court in contravention of a release order contained in a habeas corpus action, was arbitrary (Opinion No. 18/1997). General Rodolfo Robles told the Working Group that he was not released by the military court as ordered by the ruling in the legal protection action handed down by Judge Elba Minaya because it was considered that the ruling would interfere with military affairs. The same judge said that, in another situation, she had tried official habeas corpus proceedings in DINCOTE premises and ordered the release of a detainee. As a result criminal action was taken against her on charges of violence, resisting authority in violation of judicial functions and terrorism (Ministerial decision of 7 July 1997). Judges in the Public Law Chamber of the Lima High Court who accepted legal protection actions against military courts were also accused of obstructing justice.

129. The remedy of habeas corpus, which is regarded under the Constitution as a human right, is available against all authorities. The Working Group considers that the interpretation of military courts which considers this remedy to be available only when deprivation of liberty is challenged before a civil court to be without any legal basis.

130. The Working Group regrets that Legislative Decree No. 900, which amends the law on habeas corpus, gives sole jurisdiction in such actions to judges specialized in public law, for ordinary offences known as "aggravated terrorism".

2. Nullum crimen sine lege

131. Article 11, paragraph 2, of the Universal Declaration of Human Rights states that "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed", a rule which is repeated in article 15 of the International Covenant on Civil and Political Rights. This is the principle of legality.

132. The vagueness of some of the criminal laws analysed and the offences referred to in the 1998 laws is a serious violation of the principle of legality.

3. The right to a public trial

133. As stated in paragraphs 83 and 84, the right to a public trial, as provided for in article 14 of the Covenant, is being violated. Moreover, in the military courts, it is very difficult to become acquainted with the text of sentences, since these are read out and copies can be obtained only occasionally.

134. However, there is no doubt that it was the institution of anonymous judges that in the past most flagrantly violated this principle, as reflected in paragraphs 65 to 67 of this report, and as dealt with by the Special Rapporteur on the independence of judges and lawyers in paragraph 73 of his report.

4. The right to a fair and public hearing by a competent, independent and impartial tribunal

135. This right has been seriously jeopardized as a result of the dismissal of judges and prosecutors and their replacement by individuals appointed by the executive branch immediately following the 5 April 1992 coup, and especially by the lack of irremovability of provisional and substitute judges and the fact that challenges are prohibited by law.

136. Judges, especially military judges, show partiality in the treatment of accused persons. The Working Group believes that judges must limit themselves to the evaluation of facts and the application of the law, without displaying personal feelings. This principle is not respected where a judgement states that the accused "has cynically denied the facts presented in these proceedings" (Navy examining magistrate PL-10005000, case No. 009-TP-94-LC of 24 June 1994). It was also not an impartial judge who said that lawyer Ramón Landauro "has admitted self-confidently that he cannot explain why his name appears in this list, cynically stating that ...".

5. The right to be presumed innocent

137. The presumption of innocence, which is protected under article 2, paragraph 24, of the Constitution, is not rigorously applied. The judgement handed down by the Lima High Court on 20 October 1994 (case No. 95-94) states that the accused cannot be released, as "there is no substantive evidence to prove that she is innocent beyond a reasonable doubt ...". It is not often that such harsh sentences are handed down, but the lawyers interviewed indicated that there often is "natural animosity" towards persons accused of terrorist offences.

138. The presumption of innocence is also violated if prisoners are displayed to the press wearing prison clothes and carrying degrading posters when they are being transferred to court, a practice which is prohibited under Decree 01/95, except in the case of the leaders of terrorist organizations.

6. The right to be brought promptly before a judge or other officer authorized by law and to be informed of the nature and cause of the charge

139. The contents of paragraphs 71 and 93 (c) have led the Working Group to conclude that the time it takes before persons are brought before a judge is not compatible with the idea of "promptly", as provided for in article 9, paragraphs 2 and 3, of the International Covenant on Civil and Political Rights.

140. The Working Group was also informed of cases such as that of Alfredo Carrillo, a minor who was held by DINCOTE from 10 January to 18 February 1993 (Opinion No. 13/1995).

7. The right to be released on bail

141. The situations described in paragraphs 52, 80 and 81 and the relevant provisions of Legislative Decree No. 895 of 1978 are not consistent with article 14 of the Covenant (pre-trial detention should be the exception, but release may be subject to guarantees to appear for trial).

8. The right to have adequate time and facilities for the preparation of one's defence and to communicate with counsel

142. Article 14, paragraph 3 (b), of the Covenant, the Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Prisoners in Havana in 1990 and principles 7 and 8 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment seem to be seriously undermined, as shown by paragraphs 73, 76, 77, 85 and 93 (i), although the initial harshness was eliminated as a result of the adoption of Act No. 26.447. The prohibition on defence lawyers defending more than one person at a time was also repealed on 25 November 1993.

143. In Opinion No. 13/1995, concerning the case of the minor Alfredo Carrillo, the Working Group noted that the accused had had no defence and, even though the lawyer had been present during the interrogation, he had been totally passive and did not participate in any other part of the proceedings.

144. In 1994, the DINCOTE Anti-Terrorism Security System Headquarters asked the Bar Association of Piura for information on 260 lawyers, many of them outstanding human rights defenders, allegedly as part of an investigation into the illegal practice of the law by those lawyers. NGOs have argued that, if that were so, it did not explain why so many of the persons under investigation were defenders of so-called terrorists or why this was of concern to the intelligence unit. The report of the Special Rapporteur on the independence of judges and lawyers (paras. 125 and 126) mentioned other cases of harassment of lawyers.

145. The Working Group interviewed lawyers arrested in November 1997 on charges of treason. They said that the only charge that might cause them

problems was that they had defended persons accused of terrorist crimes and treason. Carlos Gamero, the defence counsel for Abismael Guzmán, was sentenced to life imprisonment for treason and there are other similar cases. The Working Group accordingly regards as positive, in this area, the repeal of the measures that led to these irregularities, in particular the repeal, through the Act of 25 November 1993, of the rule prohibiting a lawyer from defending several people at the same time. In view of the remaining risks, it encourages the Peruvian Government to persevere with these repeals and reforms.

9. The right to examine, or have examined, witnesses

146. The restrictions on evidence referred to in paragraphs 84, 93 (e) and 94 and those contained in the 1998 laws are a violation of the rights provided for in article 14, paragraph 3 (e), of the Covenant. This is also the opinion of the Special Rapporteur on the independence of judges and lawyers (paragraph 63 of his report).

10. The rights of juvenile detainees

147. Decree-Law No. 25.564 of June 1992 lowered the minimum age of criminal responsibility for terrorist offences from 18 to 15 years, which, in the Working Group's opinion, is "too young" for the beginning of criminal responsibility and is inconsistent with principle 4.1 of the Beijing Rules. The courts made the Decree-Law applicable to the offence of treason, which is contrary to its provisions, as stated by the Working Group in its Opinion No. 13/1995. It was brought to the attention of the Group that many minors were given life sentences, contrary to principle 17 of the Beijing Rules on proportionality and the needs of juveniles.

148. That Decree-Law was effectively repealed by the 1993 Code on Children and Adolescents and later expressly repealed by Decree-Law 26.447 of 1995. However, over 40 juveniles under 18 years of age have been tried or sentenced. The authorities have tried to blame a lack of documentation resulting from the destruction of public records by subversive elements. Regrettably, no other means were used to verify the ages of the persons concerned. For example, Ruth Karina Alvis was abducted by Shining Path; she was detained, tortured and sexually assaulted in military premises; she was later sentenced to 25 years' imprisonment for acts of treason allegedly committed during the period of her abduction. On 6 March 1997, the Supreme Council of Military Justice overturned the sentence, but, despite proof that the alleged acts took place when she was 17 years old, it ordered that she should be tried for the offence of terrorism. In January 1998, the trial had still not begun.

11. The right to have one's sentence reviewed

149. The restriction of the right to have one's sentence reviewed, as referred to in paragraph 93 (h) of this report, violates the guarantee provided for in article 14, paragraph 5, of the Covenant.

12. The right not to be tried twice for the same offence (non bis in idem)

150. The principle of non bis in idem, which is provided for in article 14, paragraph 7, of the Covenant, may be violated as a result of: (a) the assignment of cases to the inappropriate court by the police (para. 51); and (b) the reopening of cases in which the accused has been tried and acquitted (paragraph 57 of the report of the Special Rapporteur on the independence of judges and lawyers). This view is shared by the Working Group.

VII. "INNOCENT PRISONERS", THE LAW OF PARDONS AND THE AD HOC COMMITTEE

151. The most serious consequence of the violation of guarantees of due process, which was referred to in all the interviews, is that of the so-called "innocent prisoners".

152. The Working Group noted that judges pretend too often to have no knowledge of the methods used by the terrorist groups Shining Path and MRTA (Tupac Amaru Revolutionary Movement) to recruit occasional or permanent collaborators for their crimes. The unfortunate person thus selected has no way of standing up to his abductors; he can only obey or die. Judgements are usually unconcerned with a person's guilt or innocence and are simply a kind of check as to whether the offence is provided for by law; if it is, then the person is convicted.

153. Usually, the accused has no way of proving how he was recruited or that he was subjected to coercion or physical or moral violence. As a non-member of the group with no military training, no knowledge of underground organizations and no one to protect him, he can easily be arrested, tried and convicted in the above-mentioned conditions. Many were convicted on the basis of testimony by "repenters". The only persons they could legally confront, i.e. their abductors or the repenter who turned them in, are prohibited from appearing in court.

154. This is the issue of the "innocent prisoners", a term widely used in Peru. Many are innocent in a formal and material sense: they did not commit the acts of which they were convicted. To date, they have been the only beneficiaries of presidential pardons.

155. There are, however, others who found themselves in the typical situation of having transported a subversive, fed him, lodged him or treated his injuries, but this is not enough to make a person a criminal and sentence him to life imprisonment. Criminal law requires wrongful criminal conduct. The Peruvian Penal Code provides that acting "out of unsurmountable fear of equal or greater harm" is a ground for exemption from responsibility (art. 20, para. 7), but this provision is not enforced by the courts.

156. "They kidnapped me and took me to the woods where they indoctrinated me; after a few days they asked me to come with them; I would drive the vehicle since I knew how to drive. They took me to a house, where a young girl got in. I took them where they ordered me to; they put her out of the vehicle and

shot her, but she didn't die. Afterwards, she identified me as the driver. DINCOTE tortured me and broke two of my ribs." This person was sentenced to life imprisonment.

157. "They arrested me along with the woman I worked for as a domestic servant. They took me to Lima and tried me with two other people I did not know. I was accused of taking care of 'reds', but I did not know who they were, as I was only doing what my employer told me to do. I was sentenced to 20 years' imprisonment by the civilian court and my employer was given a life sentence by the military court."

158. When Shining Path attacked the town of Victoria in December 1993, it made Mirtha Sobrado Correa the local leader "because she was the youngest". She did not have the slightest chance of resisting. She was sentenced to five years' imprisonment for collaborating with terrorists. There are many similar stories and thousands of victims.

159. The Government has been considering a number of solutions since 1994 including a communication to Amnesty International by a committee of jurists; one by the Ministry of Justice to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1994/51); and the adoption of the Repentance Act, focusing on peasants who were abducted and forced to commit terrorist acts.

160. An "Ad Hoc Committee" was established by Act No. 26.655 of 17 August 1996 to make proposals to the Government in exceptional cases on pardons for persons convicted of terrorist-related offences on the basis of insufficient evidence of ties with terrorist organizations (art. 1). It can also recommend that persons on trial in similar circumstances should be pardoned (art. 2). The Committee is composed of the Ombudsman, a representative of the President of the Republic (a respected priest) and the Minister of Justice. It can recommend the review of cases in which there is some "doubt" about the facts. The Committee began its work on 20 August 1996 for an initial term of 180 days, which was extended until December 1998. International concern about the matter is evidenced by the large contribution made to the Committee (30 per cent).

161. Up to the time when the Working Group visited Peru, the Committee had received 2,541 applications for reprieve or pardon and had recommended that 362 of them should be granted. The President granted 360: 316 persons serving prison sentences and 44 awaiting trial. By the end of August 1998, the number had reached 438. A Committee of Solidarity, composed of the Ombudsman and NGOs, is responsible for the rehabilitation of persons who have been reprieved or pardoned.

162. According to the Committee and the Working Group, the 360 persons pardoned were subject to arbitrary detention within the meaning of category III of the Group's methods of work.

163. Ninety-five per cent of the persons pardoned had been tried by civilian courts and 5 per cent by military courts. The President of the Supreme Council of Military Justice (CSJM) maintains that military justice and its monitoring system to avoid injustice are almost infallible. He claims that

"pardons are granted to persons sentenced by civilian courts in the interests of justice, in order to correct errors, but, in the case of military courts, a pardon is granted for the sake of pardon - because they are all guilty". Judges, the members of the Committee and the members of the Supreme Court did not express an opinion on this point. However, NGOs gave an entirely different explanation: the Ad Hoc Committee is more thorough in its consideration of cases originating in special courts so as to avoid corporative reactions.

164. The Ad Hoc Committee should be commended on its efforts to obtain different forms of compensation for the persons concerned, as recommended by the Human Rights Committee (CCPR/C/79/Add.67, para. 21). A plan providing for financial compensation (a minimum income for each month of detention), access to education and health and other benefits was shown to the Working Group.

165. The bill submitted on 22 May 1997 should also be adopted. It provides that a pardon would mean that the trial and the sentence would be removed from the records, as though the beneficiary had never been accused of an offence.

166. The so-called innocent "persons wanted for questioning" also suffer the same injustice. They are persons who have been named by a repenter and against whom there is an outstanding arrest warrant, which, contrary to the general rule (Act No. 25.660), has not expired. This situation, involving over 5,000 internally displaced persons and refugees, is so serious that the Ombudsman has launched an investigation into the matter.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

167. In the light of its visit, the Working Group is able to make the following appraisal of the situation with regard to the right to justice in Peru:

(a) On the one hand, the Working Group appreciates the intense effort being made by the Government to modernize an antiquated and ineffective administration of justice, often accused of corruption, and thus to improve significantly the effectiveness of the right to justice;

(b) On the other hand, the Working Group notes that the priority which the Government rightfully attaches to combating terrorism has been the source of serious violations in view of some of the methods employed, which have resulted in a large number of arbitrary arrests;

(c) The Working Group welcomes the fact that the Government has repealed some of the laws which had been the most conducive to large-scale violations of human rights; it remains, however, seriously concerned by the persistence of certain of the practices acquired in combating terrorism, which have had the result of legitimizing the recent national security laws.

168. The ambitious process of reform of the administration of justice deserves the support of the legal community, in addition to the backing it has received from the international community. However, judicial reform is not

only a technical issue, but also a political one, and, in order to achieve its objective, it cannot overlook international human rights standards and the general principles of such important matters as the independence of judges. The process began under a cloak of suspicion because it was the result of the suspension of the Constitution and the subsequent replacement of a large number of judges. Many later events unfortunately clouded the transparency that a process of this kind requires.

169. The independence of judges means that they have to be appointed on a non-discriminatory basis, without political and other influences; that they must have tenure; and that promotions must be objective. The process which began in 1992 has not been based on these criteria.

170. The situation of military justice is particularly serious. The Working Group is of the opinion that this sector, in Peru as in many other countries, does not meet the requirements of General Comment No. 13 adopted by the Human Rights Committee to guarantee due process of law.

171. Many Peruvian criminal laws are so vague in their characterization of acts regarded as criminal that the principle of nullum crimen sine lege is being seriously undermined.

172. With regard to arbitrary detentions, the Working Group is of the opinion that the lack of independence of judges and prosecutors, especially military ones, the changes to the rules of due process and the inappropriate description of criminal acts have led to a number of "innocent prisoners", i.e. persons arbitrarily deprived of their liberty, according to Commission on Human Rights resolutions 1991/42 and 1997/50 and its own methods of work. This conclusion is shared by the Special Rapporteur on the independence of judges and lawyers, the Human Rights Committee, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, national and international lawyers and a large number of national and international non-governmental organizations.

173. The Working Group takes notes with satisfaction of the tremendous strides that have been made in the last few years, including the right of an accused person to legal counsel from the moment he is arrested; the reinstatement, albeit restricted, of the right to habeas corpus; the repeal of laws on the criminal responsibility of minors under 18 years of age; the recognition of the right to counsel of one's own choosing and the right of defence lawyers to defend more than one person at a time; less frequent use of torture and enforced disappearances; and the end of "faceless justice". The Working Group is pleased with this progress and encourages it, despite some unjustified regressive steps, such as the May and June 1998 laws and the sentencing of lawyers who defended persons charged with terrorist crimes.

174. The Working Group would like to pay special tribute to two institutions. The first is the Office of the Ombudsman, which has fully exercised the independence conferred on it by the Constitution to become the most credible and respected institution in the country. The second is the Committee on Pardons, which has already pardoned 418 persons with the President's full support.

B. Recommendations

To the Government of Peru

175. All measures should be taken to re-establish tenure for judges and prosecutors, without discrimination for political or other reasons. To this end, the powers of the National Council of the Judiciary should be restored immediately.

176. The Committee on Pardons should hand down its recommendations more speedily. Although this is not an orthodox means of re-establishing the guarantees to personal freedom and to a fair trial, it has proven useful. The Working Group encourages the President to continue to support this Committee. In any event, the Working Group believes that attention should focus on cases of military justice, which has, contrary to what the President of the Supreme Council of Military Justice (CSJM) believes, been responsible for many innocent prisoners and arbitrary detentions. It would be wise to adopt the bill submitted on 22 May 1997 so that a pardon will result in the trial and the sentence being removed from the records, as if the beneficiary had never been charged with an offence. Arrest warrants should have an expiry date and the cases of the persons "wanted for questioning" should be referred to the Committee on Pardons.

177. With regard to the prison system, judges must be stricter in exercising the powers conferred on them by articles 135 and 137 of the Code of Criminal Procedure, relating to the pre-trial release of detainees. They should also try to make better and more frequent use of alternatives to deprivation of freedom. Prison conditions should be made more humane, especially with regard to visits and access to reading materials and other types of cultural expression.

To the international community

178. The Commission on Human Rights cannot remain indifferent to the injustices committed by military courts in many countries, as this has become a universal problem of the utmost seriousness. The Working Group shares the reservations expressed in the report of the Special Rapporteur on the independence of judges and lawyers (para. 78) about General Comment No. 13 of the Human Rights Committee. As the Special Rapporteur, Mr. Cumaraswamy, states: "international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice".

179. A joint study which would be carried out with the participation of regional and universal international organizations and all bodies belonging to the United Nations system with a contribution to make, as well as of human rights and lawyers' and judges' organizations, and would lead to an intergovernmental conference aimed at eradicating this form of injustice is a specific recommendation formulated by the Working Group in this report.

180. The Working Group is of the opinion that, if some form of military justice is to continue to exist, it should observe four rules:

(a) Incompetence to try civilians;

(b) Incompetence to try military personnel if the victims include civilians;

(c) Incompetence to try civilians and military personnel in the event of rebellion, sedition or any offence that jeopardizes or involves the risk of jeopardizing a democratic regime; and

(d) Prohibition to impose the death penalty under any circumstance.

Notes

1/ See the report of the representative of the Secretary-General on internally displaced persons (E/CN.4/1996/52/Add.1).

2/ See Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44), para. 202.

3/ A more complete study of the structure of the judiciary and the Office of the Public Prosecutor can be found in the report of the Special Rapporteur on the independence of judges and lawyers (E/CN.4/1998/39/Add.1).

4/ The American Convention on Human Rights provides that the death penalty should not be re-established in States that have abolished it. In countries that have not abolished the death penalty, its application must not be extended to crimes to which it does not apply at present (art. 4, paras. 2 and 3).

5/ Robert Goldman, Professor at American University and other universities in the United States; Carlos Arslanian, former Minister of Justice of Argentina and former Appeal Court judge, who tried the cases against the members of the Military Juntas which governed Argentina between 1976 and 1983; Fernando Imposimato, judge, former Deputy and former member of the Italian Senate; José Raffucci, United States Navy commander and lawyer in Puerto Rico and the District of Columbia.

6/ This is a typical case: arrested on 6 February 1993 and brought before the military court on 26 February, she was acquitted in first instance on 5 March. On 2 April, the Navy Court Martial convicted her of the offence of treason, a verdict which was overturned on 11 August by the Supreme Council of Military Justice, which acquitted her, but ordered that she should be tried by the civil courts for the offence of terrorism. Although acquitted, she was held in detention without trial until 8 October, when the trial for the offence of terrorism - for the same act - began in Lima Examining Court No. 43, a trial in which she was convicted. The case was brought to the Working Group's attention.

7/ In Peru, it has been the rule that not only members of the armed forces, but also members of the National Police are subject to what is known as "exclusive jurisdiction" ("fuero privativo").

8/ Ronald Gamarra, Terrorismo. Tratamiento Jurídico, Legal Defence Institute, May 1996.

9/ Nevertheless, the legal texts examined mention more cases ending in acquittal than conviction. Lawyers explain this anomaly by the fact that books publish cases which may be useful in defending other cases.

UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/1999/63/Add.3
18 December 1998

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Fifty-fifth session
Item 11 (a) of the provisional agenda

CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF:
TORTURE AND DETENTION

Report of the Working Group on Arbitrary Detention

Addendum

Report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers

CONTENTS

		Paragraphs	Page
Introduction		1 - 5	2
I.	THE WHITE PAPER: THE GOVERNMENTS'S STRATEGY	6 - 8	3
II.	THE LEGAL REGIME: ESSENTIAL ELEMENTS	9 - 17	4
	A. The Immigration Act	9	4
	B. Immigration Service Instructions (non-statutory)	10 - 13	5
	C. Procedural aspects and comments thereon	14 - 17	7
III.	MATTERS OF CONCERN	18	9
IV.	IMPRESSIONS OF THE WORKING GROUP DURING THE VISIT	19 - 25	10
V.	CONCLUSIONS AND RECOMMENDATIONS	26 - 40	12

Introduction

1. In its resolution 1997/50, the Commission on Human Rights requested the Working Group on Arbitrary Detention to devote all necessary attention to reports concerning the situation of immigrants and asylum seekers who are allegedly being held in prolonged administrative detention without the possibility of administrative or judicial remedy.

2. The Working Group was invited by the Government of the United Kingdom to visit the country. The Working Group, represented by Mr. Kapil Sibal (Chairman) and Mr. Petr Uhl (member), along with Mr. Markus Schmidt (Secretary), visited the United Kingdom from 21 to 25 September 1998.

3. In the United Kingdom, the Group visited both detention centres and prisons. Among the detention centres the Group visited were Campsfield House Detention Centre, Oxfordshire; Harmondsworth Detention Centre, Middlesex; Haslar Holding Centre (HOHC) in Hampshire and Tinsley House (near Gatwick airport). The prisons visited were the prison at Rochester, Kent, and Wormwood Scrubs in London. The Group visited Heathrow airport, met with the Assistant Director, Mr. Alan Craig, and familiarized itself with the primary and secondary control areas, the asylum casework section, the holding area and other operations at Heathrow.

4. In the course of its visit the Group met with Mr. Mike O'Brien (Parliamentary Under-Secretary of State with responsibility for immigration and asylum issues) and Home Office officials. The Group also met with Mr. Colin Harbing (Immigration Service Enforcement Directorate), Mr. Francis Masserick (head of the Detention Operations Management Unit), Ms. Kathy Casey (Asylum Directorate), Mr. Bob Daw (Directorate of Dispersal Prisons - Prison Service), governors and senior managers of prisons and those in charge of detention centres, officers of the Immigration Service, members of visiting committees, assistant directors and inspectors in the Immigration Service and several other officials. The Working Group also consulted with Immigration Appellate Authorities at Hatton Cross, who are vested with the jurisdiction to grant bail to asylum seekers and hear substantive appeals. The Working Group also met with representatives of the European Council for Refugees and Exiles (ECRE) and several non-governmental organizations involved in refugee work, such as the British Refugee Council, the Refugee Legal Centre and Amnesty International.

5. At the outset, the Working Group would like to express its appreciation for the complete cooperation extended to it and the openness with which the entire visit was handled by the United Kingdom authorities. The Working Group was allowed free access to all the facilities it visited. There was a free and frank exchange of views with the officials who assisted the Group during the visit. The Group was allowed free access to the detainees with whom it conducted private interviews, in order to understand better the functioning of the legal regime applicable to immigrants and asylum seekers. Whenever the Group requested statistical data and information which it considered relevant for better comprehension of the legal regime, government officials provided the delegation with the necessary data.

I. THE WHITE PAPER: THE GOVERNMENT'S STRATEGY

6. On 27 July 1998, the United Kingdom Government published a White Paper setting out a comprehensive long-term strategy to deal with the problem of asylum seekers. This involved additional resources being made available for the implementation of the strategy and the enacting of appropriate legislation to better manage the problems of asylum seekers through streamlined and flexible procedures. The Government plans to achieve the following objectives:

(a) Increased numbers of asylum decisions so that, based on current forecasts of asylum claims, the backlog will be cleared and a decision time of two months or less will be achieved by April 2001;

(b) Expansion of the immigration appeals system, with the aim of reducing the average waiting time for an appeal to an adjudicator to four months by April 2001;

(c) Increased removals of failed asylum seekers;

(d) Expansion of the network of airline liaison officers to reduce the numbers of inadequately documented passengers travelling to the United Kingdom; and

(e) Increasing detention capacities and to reduce backlogs and waiting times.

7. The objective is to efficiently run an asylum system which settles genuine refugees expeditiously while deterring abusive claims. The Government wishes to focus on creating an efficient system of protecting genuine refugees by scrupulous application of the 1951 Convention relating to the Status of Refugees, to resolve applications quickly and to ensure that no asylum seeker is left destitute while waiting for the application or appeal to be determined. The White Paper recognizes that it is essential that procedures for dealing with asylum applications be seen within the framework of an integrated immigration control. Potential abuse and exploitation of the institution of asylum harms the genuine refugee as much as it threatens to undermine proper controls on immigration. The White Paper suggests that it is in the best interest of genuine refugees that there should be firm action to improve current procedures, including measures to deter or prevent from travelling those who do not meet the criteria for entry into the United Kingdom. The Government inherited backlogs of over 50,000 cases awaiting decision and over 20,000 queuing for an appeal hearing. Some of the undecided cases dated back to 1990, and some of the appeals may take as many as 15 months to be listed for disposal. Such delays tend to be exploited by abusive applicants and harm the interests of those who genuinely need protection but await their fate with uncertainty for long stretches of time.

8. The Working Group notes with appreciation the intention of the Government to transform the asylum process. Some of the measures which the Government contemplates include the following:

(a) Faster tests. Delivering faster decisions is crucial to the success of the Government's overall strategy. The objective is to ensure that by April 2001, most initial asylum decisions would be taken within two months

of receipt, and that most appeals to adjudicators would be heard within a further four months. Both these targets reflect average process times and the Government expects that many cases would be dealt with more quickly. To achieve such targets, the Government will need to successfully implement the Casework Programme. The Government considers that economic migrants abuse the refugee claims system because its inefficiency allows them to remain in the United Kingdom for years. A faster system with more certain removal at the end of the process would deter abuse significantly;

(b) Legal representation at asylum interviews. The Government considers that for swift and fair decision-making there is no need to make provision in all cases for legal representatives to be present at asylum interviews. The Government considers the asylum interviews to be essentially a fact-finding exercise, designed to enable the asylum claimants to state, in their own words, why they fear persecution in their own country;

(c) Post-interview representations. The Government indicates in the White Paper that it wishes to standardize the time period within which an asylum seeker would be required to make a post-interview representation. The period of five days has been proposed. In exceptional cases, however, this period may be extended;

(d) Support arrangements for asylum seekers. The support system, according to the Government, must serve the following objectives:

(i) To ensure that genuine asylum seekers are not left destitute, while containing costs through incentives for asylum seekers to rely first on their own means, or on those of their communities, for support;

(ii) To provide for asylum seekers separately from the main benefits system; and

(iii) To minimize the incentive to economic migration, particularly by minimizing cash payments to asylum seekers.

II. THE LEGAL REGIME: ESSENTIAL ELEMENTS

A. The Immigration Act

9. Paragraphs 16 to 18 of Schedule 2 of the Immigration Act, 1971 lay down the conditions and circumstances in which a person may be detained by an immigration officer and matters relating thereto. These paragraphs are set out hereunder:

"Detention of persons liable to examination or removal

"16.(1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.

"(2) A person in respect of whom directions may be given under any of paragraphs 8 to 14 above may be detained under the authority of an immigration officer pending the giving of directions and pending his removal in pursuance of any directions given.

"(3) A person on board a ship or aircraft may, under the authority of an immigration officer, be removed from the ship or aircraft for detention under this paragraph; but if an immigration officer so requires the captain of a ship or aircraft shall prevent from disembarking in the United Kingdom any person who has arrived in the United Kingdom in the ship or aircraft and been refused leave to enter, and the captain may for that purpose detain him in custody on board the ship or aircraft.

"(4) The captain of a ship or aircraft, if so required by an immigration officer, shall prevent from disembarking in the United Kingdom or before the directions for his removal have been fulfilled any person placed on board the ship or aircraft under paragraph 11 or 15 above, and the captain may for that purpose detain him in custody on board the ship or aircraft.

["(4A) A person in a vehicle may, where he has arrived in the United Kingdom through the tunnel system in that vehicle, under the authority of an immigration officer, be removed from the vehicle for detention under this paragraph.]

"17.(1) A person liable to be detained under paragraph 16 above may be arrested without warrant by a constable or by an immigration officer.

"(2) If: (a) a justice of the peace is by written information on oath satisfied that there is reasonable ground for suspecting that a person liable to be arrested under this paragraph is to be found on any premises; or

(b) in Scotland, a sheriff, or a magistrate or justice of the peace, having jurisdiction in the place where the premises are situated is by evidence on oath so satisfied;

he may grant a warrant authorizing any constable ... to enter, if need be by force, the premises named in the warrant for the purpose of searching for and arresting that person.

"18.(1) Persons may be detained under paragraph 16 above in such places as the Secretary of State may direct (when not detained in accordance with paragraph 16 on board a ship or aircraft)."

B. Immigration Service Instructions (non-statutory)

10. In addition, Immigration Service Instructions are issued to staff in relation to such detentions. These instructions are dated 3 December 1991 and 20 December 1994. Though these instructions are non-statutory in nature, they provide guidelines to officers in the course of the discharge of their duties. The policy statement in the guidelines grants temporary admission/relief

whenever possible, and authorizes detention only when there is no alternative. Once detention is authorized, it is to be kept under close review to ensure that it continues to be justified. If the person concerned is not likely to comply voluntarily with any restrictions imposed upon him/her, then he/she is required to be detained. Such assessment is, however, made in the light of the person's immigration history and circumstances. An illegal entrant who lives at a settled address, has steady employment and a subsisting relationship is more likely to adhere to the restrictions imposed than a single unemployed person with no fixed abode. Factors relevant in making an assessment of the necessity to detain will include any compassionate circumstances, such as a medical condition of the subject or of a dependent relative, the likely length of detention and the expectation of removal within a reasonable period. Accordingly, detention is opted in respect of persons who show real disregard for immigration laws and who are able to be removed within a realistic time-frame.

11. The criteria for detention are also laid down in the guidelines; these are set out hereunder:

(a) Is there any evidence of previous absconding from detention?

(b) Is there any evidence of previous failure to comply with conditions of temporary admission/release or bail?

(c) Has the subject shown blatant disregard for the immigration law (e.g. entry in breach of a deportation order, attempted or actual clandestine entry)?

(d) Has the subject attempted to gain entry by presenting falsified documentation?

(e) Is there a previous history of complying with the requirements of immigration control, e.g. by applying for a visa, etc.?

(f) What is the likelihood of the person being removed (especially in asylum cases) and, if so, after what period of time?

(g) What are the person's ties with the United Kingdom? Does he/she have a settled address/employment? Are there close relatives (including dependants) in the United Kingdom?

(h) What are the individual's expectations about the outcome of the case: are there factors, e.g. an outstanding application for judicial review, representations or an appeal, which afford an incentive for him/her to keep in touch with the Department?

12. The Instructions of 20 September 1994 stipulate that the Government's policy is to authorize detention only when there is no alternative. They state that the case for detention of an asylum seeker when he first makes his claim must be particularly strong. The policy does not encourage detention of individuals for lengthy periods, if it would be practical to effect detention at a later stage, when rights of appeal have been exhausted. The rationale is that a person who has an appeal pending or representation outstanding will

have more incentives to comply with restrictions imposed, if released, than one who faces early removal. Special consideration to release is given to such asylum applicants who have brought themselves to the attention of the authorities at the first reasonable opportunity. Port applicants who seek asylum at the outset of their examination and illegal entrants who bring themselves to notice when seeking asylum soon after arrival would perhaps have the benefit of consideration of release, as distinct from those who seek to enter clandestinely. But where the application is judged to be without foundation and in cases where the applicant has come from a safe third country, the presumption that the individual should be released unless there are strong countervailing factors may not apply. Yet, detention is to be authorized only when it is judged essential to do so.

13. Paragraphs 16 to 18 of Schedule 2 of the Immigration Act, 1971 cited above, do not indicate the criteria on the basis of which the immigration officer is entitled to refuse entry of persons who seek asylum in the United Kingdom. The guidelines are in the nature of instructions but have no statutory force. Nor is an asylum seeker informed at the outset of the reasons for the denial of entry in writing. The July 1998 White Paper envisages a legal regime and appropriate amendments pursuant to which an asylum seeker will be informed of reasons for denial of entry in writing at the first instance.

C. Procedural aspects and comments thereon

14. Once the immigration officer refuses entry to a person seeking asylum, the person is thereafter dealt with by officials of the Home Office who then decide, after recording the statement of the person concerned, whether or not to detain him. The functioning of the legal regime in the context of detention is at present guided by practical considerations relating to the availability of spaces for detention. Of the approximately 1,000 spaces where detainees may be placed at any given time, only 850 are available for use. Almost half of these spaces are either in the prisons at Rochester and Wormwood Scrubs, and at Haslar HOHC; the other half are in separate designated detention centres at Campsfield, Harmondsworth and Tinsley House.

15. At any given time the number of persons seeking entry to the United Kingdom is far larger than the number of persons who can be detained, given the limited space available (the number of persons who sought entry in 1997 exceeded 32,000). In a given year, about 20,000-25,000 persons seeking asylum are removed immediately. Accordingly, the Group was informed, about 1-1.5 per cent of the total number of persons seeking asylum are detained at any given time. The following table shows the number of detained persons as of 29 May 1998 and 1 June 1998.

Number of people recorded as being detained a/ on 29 May 1998 b/ and 1 June 1998 b/ who had sought asylum at some stage, by length of detention c/ and immigration status

Length of detention	Port applicants	Illegal entrants	Subject to deportation action	Total
Greater than 2 days but less than or equal to 1 week d/	15	23	0	38
Greater than 1 week but less than or equal to 1 month d/	54	116	5	175
Greater than 1 month but less than or equal to 2 months	44	87	3	134
Greater than 2 months but less than or equal to 3 months	39	68	4	111
Greater than 3 months but less than or equal to 4 months	24	43	5	72
Greater than 4 months but less than or equal to 5 months	19	29	0	48
Greater than 5 months but less than or equal to 6 months	25	17	2	44
Greater than 6 months but less than or equal 8 months	29	22	2	53
Greater than 8 months but less than or equal to 10 months	15	6	5	26
Greater than 10 months but less than or equal to 1 year	6	7	5	18
Greater than 1 year	6	10	7	23
TOTAL	276	428	38	742

a/ Persons detained solely under the powers contained in Schedule 2 or 3 of the Immigration Act 1971.

b/ After entry figures obtained on 29 May 1998. Port figures obtained on 1 June 1998.

c/ These figures cover people who have been in detention for less than a month. Because of the delay in recording receptions into, and releases from, detention and the large number of persons detained for a short period, the figures should be used with caution.

d/ In some cases the date a person enters detention may be understated due to the method of recording.

16. The lack of capacity on the one hand and the growing numbers seeking entry for asylum on the other produce inequitable results. For example, a person who is liable to be detained may well be released subject to conditions only because there is no available space for accommodation. On the other hand, a person whose case for release is stronger may well be detained because of availability of space. This anomalous situation in the functioning of the legal regime exposes the Government to the charge that the decision to detain is not determined by the quality of the applicant's case but by the physical consideration of availability of space. It may be mentioned at this stage that the White Paper seeks to address this problem by reducing dependency on prison services and by increasing the number of spaces in designated detention centres.

17. Once the decision to refuse entry and to detain has been made, the detainee is entitled, as of right, to appeal against the decision and to seek bail. For that purpose, the Immigration Appellate Authorities are required to adjudicate upon the claims of such detainees. All appeals of persons who claim refugee status, whether detained or not, that are received from the Home Office are scheduled for the first hearing within six weeks. Once asylum is refused and the person is either released on conditions or detained, he appears before an adjudicator who determines whether evidence is required. At the time of adjudication, the individual may be represented by counsel, as he is entitled to free legal representation. The adjudication proceedings are adversarial in nature and the decision by the adjudicator (judge) is in writing, giving full reasons for the decision. There is a further appeal from the decision of the adjudicator (judge) to the Immigration Appeals Tribunal, but before such an appeal can be filed the applicant has to seek leave to appeal and the Tribunal entertains the appeal only on a point of law. If the adjudicator (judge) refuses leave to appeal, the matter can be taken by the applicant in judicial review to the High Court where the applicant can plead that leave to appeal ought to have been granted. Normally, the decision by the adjudicator (judge) is taken within two weeks of the oral hearing. From the order of the Tribunal, the matter can also be brought before the Court of Appeal. The adjudicator (judge) is further entitled, at the time of the hearing, to grant bail. The right to bail is available to the applicant even before the final hearing of the appeal. In the event a person is detained, the adjudicator is entitled to grant bail and proceedings in the normal course will continue thereafter.

III. MATTERS OF CONCERN

18. The United Kingdom must observe the provisions of the 1951 Convention relating to the Status of Refugees and the other international instruments to which the United Kingdom is a party, i.e. the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms. The functioning of the legal regime in the United Kingdom, in the context of the above international instruments, gives rise to the following concerns:

(a) The functioning of the legal regime on occasion makes the restriction on liberty and free movement sufficiently prolonged that it might in specific instances result in arbitrary deprivation of liberty;

(b) The release of certain persons on account of non-availability of space and the detention of certain other persons whose cases for release are much stronger but who are detained because space is available makes detention dependent on the availability of space, rather than the quality of the applicant's case;

(c) Upon detention, there is no immediate access to court or to a quick judicial remedy;

(d) There is no judicial oversight of detention;

(e) At the outset, no written grounds for detention are communicated to the applicant;

(f) There are no written rules or statutory procedures delineating the obligations of the Government towards detainees and the rights of detainees while in custody;

(g) There is no specified time limit within which, pursuant to an order of detention, the applicant is required to be produced before an adjudicator. There is also no legal regime for time-bound appeal disposal and procedures in regard thereto;

(h) The decision to detain an asylum seeker is made by an immigration officer who may not have sufficient training in refugee law or the human rights situation in the refugee-producing countries. There is also no effective remedy to challenge a decision before a court or before an independent review body. Although the White Paper proposes that an asylum detainee will have an automatic right to a bail hearing after seven days of detention, in many instances legal aid may not be available for a bail hearing. Even though a bail hearing may be provided, as promised by the Government in the White Paper, this would not be an effective substitute for an independent review whereby the reasons for a decision to detain may be challenged. Consequently, asylum seekers may have no effective opportunity to challenge the reasons for detention, as a bail hearing would only examine reliability of surety and its relationship to the applicant.

IV. IMPRESSIONS OF THE WORKING GROUP DURING THE VISIT

19. The Working Group has the distinct impression that the present Government, on the one hand, wishes to help genuine asylum seekers by making it easier for them to seek entry into the United Kingdom, but, on the other hand, seeks to make the legal regime tighter for those who set out to seek asylum on unfounded grounds. The Government is seeking to make the law sufficiently accessible and precise in order to avoid all risk of arbitrary detention. In this context, the Government is committed to effecting the following changes, as reflected in the White Paper: to provide for written grounds for detention at the outset, judicial oversight of detention, an increased number of places in detention centres, written rules and sanctions for detainees, in particular concerning the obligations of the Government towards the detainees, and uniform legislation to regulate custody of detainees.

20. The Working Group conducted separate interviews of a large number of detainees. The impressions of the Group were as follows:

(a) A large majority of asylum seekers were economic migrants;

(b) A large number of economic migrants were aware of the fact that their travel documents were either forged or that they were not in possession of the correct identification documentation, and of the risks entailed in being apprehended and discovered at the time of entry;

(c) A small percentage were genuine asylum seekers.

21. The Government's position is that lack of availability of space for detention obliges it to release a large number of asylum seekers who otherwise may have been liable to be detained, though the Working Group does not accept the proposition put forth by the Government that it was the release of such persons which was arbitrary, rather than their detention.

22. The Working Group came across several instances where the authorities had detained persons who had been in the United Kingdom for long periods of time, in some instances, for over 10 and even 12 years. Throughout these years, the persons concerned complied with all the requirements and conditions of release imposed at the time of entry. The explanation given was that this situation was unavoidable since the appeal procedures and subsequent court proceedings had taken a long time; this does not, however, detract from the inherent injustice of the situation. The Group was informed that the person is allowed to remain in the United Kingdom only if the procedures are not completed within a period of 14 years. This period is far too long. To avoid such situations, the authorities must do everything possible to hasten the process of appeals and court proceedings. A rational rule based on proportionality may also be framed to obviate the necessity of detaining persons who have already been absorbed into society.

23. It must, however, be conceded that proceedings before appellate authorities and the courts are not entirely controlled by the Government. The issue requires a fresh look. Those who have overstayed in the United Kingdom or otherwise await completion of proceedings for long periods should not be subjected to detention. The Group was informed that the reason for detention was that pursuant to the conclusion of all legal remedies, it is likely that the persons concerned will abscond and will be therefore unavailable to the authorities for removal or deportation. Detention in these circumstances may be legally justified, but the fact remains that the removal in such circumstances of a person who has developed roots in the society from which his removal is sought is inherently unjust.

24. The Working Group came across instances where persons had been detained for long periods of time awaiting deportation. In many cases, countries of origin are reluctant or unwilling to accept their nationals, and the implementation of the deportation order takes a long time. Frequently, the person concerned does not have valid documentation for the issuance of a passport or entry permit. If the country of origin of the applicant does not respond favourably to the person awaiting deportation, the United Kingdom authorities have to find a third country to accept him. Locating such a

country and the subsequent processing of documentation take several months, during which the person continues to be detained. This is another area which requires looking into.

25. Though the mandate of the Working Group relates to the scrutiny of the applicable legal regime in the context of the detention of immigrants and asylum seekers, the Working Group wishes to note that the detainees it visited, both in prisons and in detention centres, were kept in conditions that were humane and consistent with international legal standards, and that the United Kingdom authorities made an effort to create an environment for the detainees that was consistent with basic human rights.

V. CONCLUSIONS AND RECOMMENDATIONS

26. The Government should ensure that detention of asylum seekers is resorted to only for reasons recognized as legitimate under international standards and only when other measures will not suffice; detention should be for the shortest possible period.

27. At the time of detention, detainees should be provided in writing, in a language they understand, with the reasons for detention.

28. At the time of detention, detainees should be provided with a written explanation of their rights and how to exercise them.

29. Each decision to detain should be reviewed as to its necessity and its compliance with international legal standards by means of a prompt, oral hearing by a court or similar competent independent and impartial review, accompanied by the appropriate provision of legal aid. In the event that continued detention is authorized, detainees should be able to initiate further challenges against the reasons for detention.

30. Detainees should be held in special immigration detention centres in conditions appropriate to their status and not with persons charged with or convicted of criminal offences (unless so charged or convicted themselves).

31. Detainees should be given adequate access to their legal representatives, relatives and officials of the Office of the United Nations High Commissioner for Refugees.

32. The Government should concentrate the use of detention on appropriate cases of rejected asylum seekers at the end of the asylum determination process (i.e. when the incentive to abscond is increased) or where removal is imminent and there are reasons to believe it cannot be effected unless the individual is detained. The power to detain should not be exercised if the person concerned is, on the basis of substantiated evidence, fully absorbed into the society from which his removal is sought. The relevant Schedules of the Immigration Act should spell out permissible criteria for detention.

33. Alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention.

34. The detaining authorities must assess a compelling need to detain that is based on the personal history of each asylum seeker.

35. An absolute maximum duration for the detention of asylum seekers should be specified in national law.

36. Any review body should be independent from the detaining authorities.

37. Unaccompanied minors should never be detained.

38. Specialized non-governmental organizations, the Office of the United Nations High Commissioner for Refugees and legal representatives should have access to all places of detention, including transit zones at international ports and airports.

39. All staff should receive training related to the special situation and needs of asylum seekers in detention.

40. National authorities should provide detailed information on relevant policy, practice and statistics in order to ensure transparency.

UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/1999/63/Add.4
16 December 1998

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Fifty-fifth session
Item 11 (a) of the provisional agenda

CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF: TORTURE AND DETENTION

Report of the Working Group on Arbitrary Detention

Addendum

Visit to Romania

GE.98-14982 (E)

Introduction

1. A mission of the Working Group on Arbitrary Detention, composed of Mr. Kapil Sibal (Chairman) and Mr. Petr Uhl (member), and accompanied by Mr. Markus Schmidt (Secretary) visited Romania from 27 September to 2 October 1998, at the invitation of the Government of Romania. The visit was conducted in application of Commission on Human Rights resolution 1997/50, paragraph 4, in which the Working Group was requested to examine the situation of "immigrants and asylum seekers who are allegedly held in prolonged administrative custody without the possibility of administrative or judicial remedy".

2. The Working Group expresses its gratitude to the Romanian Government for the invitation and the organization of the visit, which was marked by a spirit of full cooperation on the part of the authorities, transparency and goodwill. The Group appreciates the continuous availability of Major Alexandru Corneliu and Colonel Maximilian Turza throughout the visit. With the exception of a planned meeting with an immigration appeal judge, all meetings scheduled by the Group took place.

I. CONSULTATIONS WITH THE AUTHORITIES

3. The Working Group visited Bucharest and Giurgiu. At the Bucharest office of the Office of the United Nations High Commissioner for Refugees (UNHCR) it held discussions with representatives of non-governmental organizations and lawyers of asylum seekers. Talks with the Romanian authorities included a meeting with the four-member commission that examines and approves applications for asylum. The Group called on the Ministry of the Interior, represented by the Director-General of Frontier Police, Refugees, Aliens, Migration and Passports, Brigadier General Ovidius Paun. At the Ministry of Foreign Affairs, the Group met with the Director-General for Human Rights, Legal and Consular Affairs, Mr. Cristianu Diaconescu. Talks at the Ministry of Justice were attended by Ms. Aurel Ciobanu-Dordea, representative of Romania to the Council of Europe and member of the European Commission against Racism and Intolerance. The Working Group made a special request to meet with the head of the Office for Refugees at the Ministry of the Interior, Colonel Vasile Dragoi. Its request for a meeting with a judge deciding applications for asylum on appeal could not be met.

4. During discussions with the four members of the inter-ministerial commission deciding on applications for refugee status, it became clear that Romania has a limited capacity for internment of asylum seekers, i.e. a limited capacity at Otopeni international airport and a centre at Giurgiu. New centres are under construction in Arad (with funds from the Phare Programme of the European Community) and in Iasi; the new centre at Otopeni international airport, with 250 places, is nearing completion. After their completion, the new centres will house 500-600 persons. (The commission refers to asylum seekers as being "accommodated", not "detained".) Under the applicable procedure, one of the 23 employees of the Office for Refugees interviews the asylum seeker, and the commission renders a decision within 30 days. Only a small number of applicants - about 2-3 per cent - are interned, and this decision is not made by the commission but by the competent

police officer of the Office for Aliens and Migration. If an application is rejected, the commission produces a detailed explanation of the reasons for rejection. Within 10 days, oral proceedings are held in court, with the applicant present. It is possible to lodge an appeal against the decision of the court, which is decided by the municipal court in Bucharest in a closed hearing. The members of the commission were unable to clarify whether the second instance examines the merit of the case or whether this second instance amounts to cassation, where only possible procedural errors are examined (the Group was subsequently given a clear explanation at the Ministry of Justice). According to the members of the commission, refugee status is granted in more than 50 per cent of cases falling outside the framework of the 1951 Convention relating to the Status of Refugees, notably for humanitarian reasons.

II. THE GRANTING OF ASYLUM IN ROMANIA

5. Certain basic facts must be laid out in order to understand the legal regime applicable to asylum seekers in Romania. Romania is a transit country for asylum seekers. Many Iraqi citizens transit through Romania en route to other destinations. Many asylum seekers seeking to enter Romania use forged documents and false identities; when apprehended they are detained, since illegal entry into Romania is a criminal offence. On occasion, when asylum seekers with forged passports and visas travelling towards Western Europe are apprehended in Romania, they apply for asylum in order to avoid prosecution. The moment asylum is applied for in accordance with the law, the Ministry of Interior becomes involved and until the application for asylum is dealt with, the asylum seeker is not prosecuted. In many instances, asylum seekers have no original documentation. They either travel hidden in a train compartment or in lorries and as soon as they land at the border they request asylum. Until such time as their application for asylum is dealt with, they are either allowed to enter the country or, in certain specific situations, they are detained and sent to Giurgiu. Romania is clearly not a target country but a transit country for asylum seekers.

6. There are broadly speaking, three categories of asylum seeker. One group is composed of those who come to Romania legally through Otopeni international airport. Their apparent reason for seeking entry is business, but after they are admitted they have no intention of returning to their country of origin and overstay their visa. At that moment, their presence in Romania becomes illegal. When they are apprehended they are sent to Otopeni to be repatriated. Some of those who are apprehended after the expiration of their visas or passports request asylum, and on account of the lengthy legal procedures they are not deported. It might be noted here that on the basis of humanitarian considerations, Romania does not deport individuals to countries that are in a state of civil war or which face ethnic conflict, such as Yugoslavia.

7. The second category, who represent about 90 per cent of all asylum seekers, are those who enter Romania illegally. They are in touch with agencies who, for a consideration, help illegal entry into Romania. Some come from Turkey or Bulgaria but many come from South Asia (Bangladesh, Sri Lanka, Pakistan, India), via Moscow, the Ukraine or the Republic of Moldova. The destination of many of these persons is either Germany or Scandinavia.

8. The third category of asylum seeker is those who enter Romania as students. After having acquired academic qualifications, they overstay their student visas. They are mostly from the Islamic Republic of Iran and Iraq, as well as from Rwanda and the Democratic Republic of the Congo. Some of them, after achieving academic qualifications, establish companies and become traders. At the time of its visit, the Group was told that numerous Chinese citizens were arriving in Romania from various destinations.

9. Over the past few years, the number of asylum seekers has totalled some 500-1,000 annually, reaching 1,424 in 1997 and totalling 758 during the first eight months of 1998. Most of them - more than 50 per cent - come from Bangladesh, Iraq, Somalia and Pakistan. Only a limited number are granted refugee status - 12.7 per cent in 1997, 14.7 per cent during the first eight months of 1998. According to other statistics, in the first eight months of 1998, 38 persons were granted refugee status out of 300 appeals against negative decisions by the commission lodged with the court of first instance. Since 1994, when Romania initiated work on a new law on citizenship, no one has been granted Romanian citizenship, including those who have lived in the country for many years. The only exception are Romanian repatriates.

10. According to information given to the Group by the authorities, approximately 90 per cent of asylum seekers commit some sort of criminal offence.

11. The legal regime applicable to refugees in Romania is controlled by the Romanian Refugee Law, adopted by Parliament in March 1996 and promulgated on 2 April 1996 (Law No. 15/1996). It came into force on 5 May 1996. Some of the significant features of this law are set out below.

12. Under the terms of article 1, refugee status is granted, upon request, to a foreigner who proves that he has justified fears of being persecuted in his country of origin for reasons of race, nationality, religion, membership of a particular social group or for his political opinions. By the term "country of origin" is understood, in the case of a person with several nationalities, each country of which the person is a citizen and in the case of a stateless person, the country where he/she is domiciled. The foreigner who obtains refugee status in Romania has to comply with Romanian legislation and the international conventions relating to refugee status to which Romania is a party.

13. It is significant, however, that refugee status can also be granted for humanitarian reasons to a foreigner who does not fulfil the conditions laid out in paragraph 1 of article 1. This is provided for in article 2.

14. The procedure for granting refugee status is set out in chapter II of Law No. 15/1996. Articles 6 to 14 of which spell out a detailed procedure which requires the foreigner seeking refugee status to submit a motivated written request to the competent authorities; when such a request is made to a unit of the Border Police, entry of the foreigner into the country is permitted. After receiving the application, the General Directorate of Border Police, Aliens, Migration Issues and Passports of the Ministry of the Interior

or one of its territorial units is required to examine the documentation and issue to the individual a certificate which will serve as a temporary identity document in Romania. If the claimant does not have the necessary material means, his place of residence will be established by the authorities, who may issue him a document with which he can travel free of charge.

15. Under article 9 of Law No. 15/1996, a commission appointed by the Government and made up of representatives of the Ministry of the Interior, Ministry for Foreign Affairs and Ministry of Labour and Social Protection, which together comprise the Romanian Committee for Migration Problems, has the competence to examine the application on and render a decision at first instance. Whenever an application is made to an organ of the State for the grant of refugee status, said application is submitted to the commission within 10 days; the commission is obliged to decide on the application within 30 days of its receipt.

16. Article 10 obliges the person seeking refugee status to fulfil certain obligations. These are:

(a) To submit, in writing, a motivated application with the data indicated by the organ to which the application is to be submitted;

(b) To hand over the document used for crossing the border and to receive the document specified in paragraph 1 of article 8;

(c) To answer to the competent organs and to provide them with complete and true information regarding his person and his request;

(d) Not to leave the place of residence without the authorization of the organ to which the request was submitted or that of the commission mentioned in article 9;

(e) To present himself for the medical examinations arranged for him;

(f) To exhibit correct and civilized conduct and to obey the laws of the Romanian State and the measures established by the Romanian organs with competence in refugee matters.

17. Under article 11, however, the commission is entitled to reject the request for refugee status on the following grounds:

(a) If he does not fulfil the conditions set out in paragraph 1 of article 1;

(b) If he finds himself in one of the situations set out in article 4 (see paragraphs 33-34 below);

(c) If he does not provide, with ill intention, all the data and information needed by the Romanian organs competent for handling the claim;

(d) If he attempts to obtain refugee status by presenting erroneous data or information;

(e) If he does not comply with any of the obligations set out under article 10;

(f) If he has already been granted refugee status by another country against which he cannot invoke the application of paragraph 1 of article 1.

18. The decision to either accept or reject the application for refugee status is communicated to the claimant in writing and can be challenged by filing an appeal within 10 days of the date of communication (art. 13). The appeal is judged under an emergency procedure by the court of first instance located within a certain radius of the commission's headquarters, or by the court of first instance where the applicant has his residence. The appeal is judged by a panel of two judges with the participation of the prosecutor. If, however, the decision is against the claimant, he is subject to the provisions of the Law relating to the Regime of Foreigners in Romania (Law No. 25/1969). Thereafter, his "residence" can be directed to be established, which amounts to de facto detention. Such claimants can be sent to detention centres like Giurgiu, from where they await removal to either their country of origin or an appropriate destination. The decision of the court may be appealed to the Country Tribunal, either by the asylum seeker or by the prosecutor, within five days.

19. Article 15 confers on a person who has been granted refugee status the following rights:

(a) To remain on the territory of Romania and to obtain the documents necessary for proving his identity and for crossing the border;

(b) To choose his place of residence and circulate freely, under the conditions provided by the law on foreigners;

(c) To be employed by physical or juridical persons, to exercise any of the liberal professions, to engage in trade and other juridical acts as provided for by law;

(d) To be remunerated and benefit from other material rights deriving from activities undertaken, as well as from social security, as provided for by law;

(e) To follow primary education under the conditions established by law for Romanian citizens, and the other educational levels under the conditions provided for foreigners;

(f) To benefit from treatment equal to that accorded to Romanian citizens with respect to the freedom to practise one's religion and religious education for one's children;

(g) Free access to the judiciary and to administrative assistance;

(h) Not to be expelled or returned, except for reasons of national security or public order, and when such measures are taken, the concerned

individual cannot be sent to territories where his life or freedom would be endangered on grounds of race, religion, nationality, membership of a particular social group or political opinions;

(i) To receive on request, within the State's financial possibilities, reimbursable aid, established at the level of the minimum salary for a period of six months, if for objective reasons he lacks the necessary means of subsistence. For well-founded reasons, this aid can be extended for a period of up to three more months.

20. Under article 18, the claimant's refugee status can be revoked if:

(a) It has been granted on the basis of false statements made by the applicant or obtained by him fraudulently;

(b) After being granted refugee status, the foreigner has committed one of the acts specified in article 4 or it has been discovered that he had committed such an act before the final decision by which he was granted refugee status.

21. The above implies that if a person who has obtained refugee status commits an offence punishable under Romanian law, then his refugee status can be revoked and he may be deported. Under article 21, once a person's refugee status is withdrawn or cancelled, he is liable to be deported or removed to his country of origin or any other country. It should be noted at this stage that Romania has ratified the Convention relating to the Status of Refugees and its 1967 Protocol. The right to asylum is enshrined in article 18 (2) of the Constitution of Romania, under which "the right of asylum shall be granted and withdrawn under the provisions of the law, in compliance with the international treaties and covenants to which Romania is a party".

22. According to article 11 (2) of the Romanian Constitution, treaties ratified by Parliament are part of national law. Pursuant to article 20 (2), international regulations take precedence over internal laws, in the event of any inconsistencies between the internal laws and those pacts and treaties relating to fundamental human rights to which Romania is a party. Article 19 (3) of the Romanian Constitution guarantees that "expulsion and extradition shall be ruled by a court".

23. Despite this constitutional protection against expulsion, the 1969 Law relating to the Regime of Foreigners in Romania, which, inter alia, confers authority on the Minister of the Interior to issue an expulsion order against an alien, is still in force.

III. ADMINISTRATIVE DETENTION

24. The Working Group visited the facilities for the detention of asylum seekers at Otopeni international airport in Bucharest, the facilities at Baneasa airport, also in Bucharest, a housing facility for refugees and asylum seekers at 26 Gociu Street, Bucharest, and a shelter facility for foreign citizens in an irregular situation at Giurgiu. The Group was able to interview all the individuals accommodated at Gociu and those interned at Giurgiu without the authorities being present.

25. At the time of the Group's visit, three individuals were interned in cells at Otopeni international airport, two Pakistani citizens and one Iraqi. They appeared to be free to leave the area where the cells are located to go into the transit area, but no further. In the transit area, the Group saw about 50 Chinese citizens who had not requested asylum but had intended to enter Romania as businessmen. However, the Romanian authorities had denied them entry on the ground that they did not regard them as businessmen (Chinese citizens arriving in Romania as businessmen do not require Romanian visas). The Chinese citizens were to be returned, on the same day or the day after, by plane to Moscow. According to information conveyed to the Group by the police, some 6,500 Chinese citizens attempted to enter Romania as businessmen in the course of the first nine months of 1998.

26. Aliens are usually deported by air. Many aliens facing imminent deportation on the basis of a court decision submit an application for refugee status at the airport, immediately prior to expulsion. Until their application is processed, they are "accommodated" at the airport, sometimes for several months. At the time of the Group's visit, no one was interned at Baneasa airport.

27. The detention facility at Giurgiu is a wooden-fenced house with an adjacent yard, with three outdoor lavatories which are in extremely poor condition. The roof of the house is leaking, and individuals interned at Giurgiu complained that whenever it rained, everything was soaked. The rooms are unfurnished, and persons sleep two to a bed on thin mattresses. The kitchenette is dirty and such water as is available tends to be unclean. While material conditions of detention do not as such fall within the mandate of the Working Group, they were so degrading at Giurgiu that the Group protested during its discussions at the Ministries of Foreign Affairs, Interior and Justice.

28. At the time of the Group's visit, 61 individuals were detained at Giurgiu, most of them on the ground that their passports had been forged or had expired. The majority of them had been detained at Giurgiu for periods of between a week and two months; four had been there for over six months, and, on the basis of the information given to the Group, no one for more than eight months.

29. While the authorities did not indicate to the Group the total number of detained asylum seekers in Romania, it is clear that there is currently no facility other than Giurgiu where asylum seekers are interned. Some of the individuals interviewed by the Group at Giurgiu had previously been detained in prison facilities in other parts of the country, after having sought asylum to prevent prosecution for illegal border-crossing.

IV. MATTERS OF CONCERN RELATING TO THE IMPLEMENTATION OF THE LAW APPLICABLE TO REFUGEES

30. In its application, the law applicable to refugees brings about the following anomalies:

(a) A large number of asylum seekers, a majority of whom are economic migrants, are apprehended when they attempt to cross the border illegally.

They may orally ask for asylum at that stage, but such a request is disregarded since the refugee law requires a written motivated application for seeking asylum, and that within a period of 10 days of crossing the border. A large number of illegal immigrants are neither well versed in the law and its procedures, nor are they familiar with the language or the environment of an alien land. Having sought to cross the border illegally, thereby committing a criminal offence, they are naturally interned and dealt with under normal criminal statutes even though they might have orally asked for asylum;

(b) Those whose applications are pending or who have been granted asylum are subject to the harsh legal regime of Law No. 15/1996, as their application for refugee status is dismissed or their refugee status cancelled in the event that they have violated, for example, article 10 of Law No. 15/1996. In that eventuality, they are dealt with under the regime applicable to aliens. Since their status as refugees can be revoked or their application rejected on the basis of rather unsubstantiated or vague criteria, they are always at risk of being dealt with under the Law relating to the Regime of Foreigners (No. 25/1969) - which affords no real remedy. Even the remedy of habeas corpus is neither applicable nor available. They are, accordingly, constantly under the threat or risk of arbitrary detention;

(c) For those to whom the Law No. 25/1969 applies, there is no judicial remedy which would allow for the legality of their deportation to be determined. Even though the Romanian Constitution stipulates (see article 19 (3)) that a person cannot be expelled or extradited except after a court ruling, the expulsion or deportation of a person regarded as an alien under the Law is not effected pursuant to any judicial proceeding in which the person concerned is ordered to be deported.

31. Article 22 of Law. No. 15/1996 seeks to limit the duration of refugee status to three years with the possibility of an extension for up to a maximum of another two years if the refugee proves once again that he or she still meets the definitional criteria in Law No. 15/1996.

32. It is a cause for concern that in the Refugee Law, the right to protection against refoulement applies to recognized refugees only. The Law makes no express reference anywhere to protection against refoulement in the case of asylum seekers.

33. Article 4 of Law No. 15/1996, which sets out grounds for exclusion from refugee status for certain categories of persons, far exceeds the exclusion clauses of article 1 D, E and F of the 1951 Convention. For example, in the case of serious non-political crimes, whereas the 1951 Convention excludes from refugee status only persons who have committed such crimes outside the country of refuge prior to their admission in that country, the Romanian Law also excludes from refugee status (under article 4 (b)) persons who have committed any offence on the territory of Romania "for which the law provides a punishment of more than three years of imprisonment". Such an offence may include, for example, illegal crossing of the Romanian border, which is punishable by varying terms of imprisonment ranging from three months to seven years under the Law concerning the Frontier of the Romanian State (Law No. 56/1992). Also excluded from refugee status under article 4 (c)

of Law No. 15/1996 are persons who have "committed deeds which are contrary to ... international treaties and conventions concerning refugees and to which Romania is a Party".

34. In addition to the exclusion clauses in article 4 of Law No. 15/1996, article 10 imposes on applicants for refugee status a number of obligations, enumerated in paragraph 16 above, which, if not complied with, would lead to automatic rejection of an application pursuant to article 11 (e) of the Law. Leaving one's place of residence without authorization is considered under Law No. 15/1996 sufficient reason automatically to reject the asylum application, leading to immediate detention and the application of the Law relating to the Regime of Foreigners.

35. Under article 6 of Law No. 15/1996, asylum seekers must apply for refugee status within 10 days of their entry into Romania. Article 6 automatically bars from access to the territory of Romania undocumented asylum seekers who do not "arrive directly" from a country where their life or liberty is threatened on any of the grounds contained in article 1 of the Law. As such, the Law confers authority on the border guard/police officer, who does not necessarily have up-to-date knowledge about conditions in countries of origin of asylum seekers, to determine the evidential and credibility issues pertaining to the refugee claims of persons seeking admission to the territory of Romania without valid documents or an entry visa. Article 6 of Law No. 15/1996 also appears to incorporate into the legislation the notion of a "safe third country" without expressly defining it or giving any indication as to the scope of its application. The implementation regulations for the Law, issued by the Government on 13 November 1996 as Government Decision No. 1182, interpret "direct arrival" as including situations where the asylum seeker "transits third countries which are not signatory to international conventions relating to the status of refugees" or where he/she "was unable to claim refugee status on the territories of transited countries owing to reasons not imputable to him/her". As far as its application in practice is concerned, the "direct arrival" provision of article 6 has not been limited to the question of admission of undocumented asylum seekers as provided for in the Law, but has also been relied on by the inter-ministerial commission in the determination of refugee status at first instance. In a number of cases, the commission has used this provision as a "test of credibility" and held in effect that a well-founded fear of persecution could not be established where an applicant has transited any third State which is signatory to the 1951 Convention. An applicant so rejected is not returned to the presumed "safe third country" he/she transited so that the authorities of that country can examine the applicant's asylum request, but is liable to expulsion to his/her country of origin once the appeal procedure is exhausted.

36. Asylum seekers held in the transit zone of Otopeni international airport subjected to deprivation of liberty do not benefit from the constitutional guarantees that "any person detained ... shall be promptly informed, in a language he understands, of the grounds for his detention ... and that notification of the charges against him shall be made only in the presence of a lawyer. ..." Nor are they informed about the practical steps they must take in order to request refugee status in Romania if they have a well-founded fear of persecution if returned to their country of origin. This is primarily

because the Romanian authorities do not consider this category of asylum seeker to have "entered" Romania and to be subject to Romanian jurisdiction.

V. CONCLUSIONS AND RECOMMENDATIONS

37. The Working Group believes that illegal immigrants who may not have filed a motivated written application for asylum should be granted the same treatment as those who formally seek asylum as prescribed by the law. Otherwise, such illegal immigrants are subject to detention and removal or expulsion from Romania without any legal safeguards and without their expulsion having been ruled upon by a tribunal, thus rendering their detention and subsequent removal arbitrary.

38. The Romanian Government is requested to ensure that the criminal offence of crossing the border, punishable by three years' imprisonment or more, is not made the basis for rejecting the application for asylum, which automatically results in removal and deportation without the intervention of a tribunal, thus making the operation of the legal regime harsh and inconsistent with article 9 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights.

39. The personnel of the Border Police should be sufficiently sensitized to the problems arising from the influx of illegal immigrants into Romania so that such immigrants are not arrested and prosecuted before they can convey their intentions and have them understood. An oral intention to seek asylum should be given the same status as a motivated written application; otherwise, an asylum applicant is liable to be arrested arbitrarily on technical grounds.

40. The situation arising from criteria enumerated in articles 4 and 10 of Law No. 15/1996, pursuant to which the refugee status of an individual may be revoked, resulting in detention and removal from Romania, exposes every refugee to grave risks of arbitrary detention. The Working Group recommends that the Government eliminate from the Law such criteria as those indicated in the articles cited, since they give wide powers to the authorities.

41. The situation arising from the limited duration of refugee status granted to applicants under article 22 of Law No. 15/1996 should be remedied, as it is inconsistent with article 14 (1) of the Universal Declaration of Human Rights.

42. Protection against refoulement should be made to apply to all asylum seekers instead of recognized asylum seekers only.

43. The exclusion clauses in Law No. 15/1996 should be made consistent with the exclusion clauses of article 1 D, E and F of the 1951 Convention relating to the Status of Refugees.

44. The Working Group believes that the power conferred by article 18 of Law No. 25/1969 (the Law relating to the Regime of Foreigners) to determine the place of residence of individuals to be governed by its provisions is nothing short of the power of detention, ex facie arbitrary, since the Law requires no reason to be given to the individual at the time of detention. The Law does not even entitle the individual to seek legal recourse in the

event of the exercise of such power. Considerations of public order or State security, as applied to those seeking asylum or to those whose refugee status may be revoked on the basis of vague or imprecise criteria, make said provisions inconsistent with article 14 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights. A similar provision in article 8 of Law No. 15/1996 is subject to the same criticism, even though the Group was told that the police do not apply this provision in the case of asylum seekers.

45. The Working Group recommends that the situation be remedied by provision of adequate legal safeguards, consistent with international standards for the protection of the individual, and by making available adequate judicial remedy or remedies.

46. Law No. 25/1969 should provide for adequate legal safeguards and remedies for all aliens who are facing expulsion or extradition consistent with international legal instruments (e.g. the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights).

47. Law No. 25/1969 must be brought into conformity with article 19, paragraph 3, of the Romanian Constitution which prohibits any expulsion and extradition in the absence of a court ruling.

48. All asylum seekers subjected to deprivation of liberty should be granted constitutional protection, be informed promptly of the grounds for their detention and be afforded all legal remedies available to them with a view to obtaining their release.

49. Detainees should be provided, at the time of their detention, with the reasons for their detention in a language which they understand.

50. Detainees should be provided, at the time of their detention, with a written explanation of their rights and how to exercise them.

51. Each decision to detain should be reviewed as to its necessity and compliance with international standards by means of a prompt, oral hearing by a court or similar competent independent and impartial review, accompanied by the appropriate provision of legal aid. In the event that continued detention is authorized, detainees should be able to initiate further challenges against the reasons for detention.

52. Detainees should be given adequate access to their legal representatives, their relatives and to officers of the United Nations High Commissioner for Refugees.

53. Specialized non-governmental organizations, the Office of the United Nations High Commissioner for Refugees and the legal representatives of detainees should be granted access to all places of detention, including the transit zones at international ports and airports.

54. All staff should receive appropriate training related to the special situation and the needs of asylum seekers in detention.